

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,052

FRED S. KOGOD AND CELIA KOGOD, *Appellants*,

v.

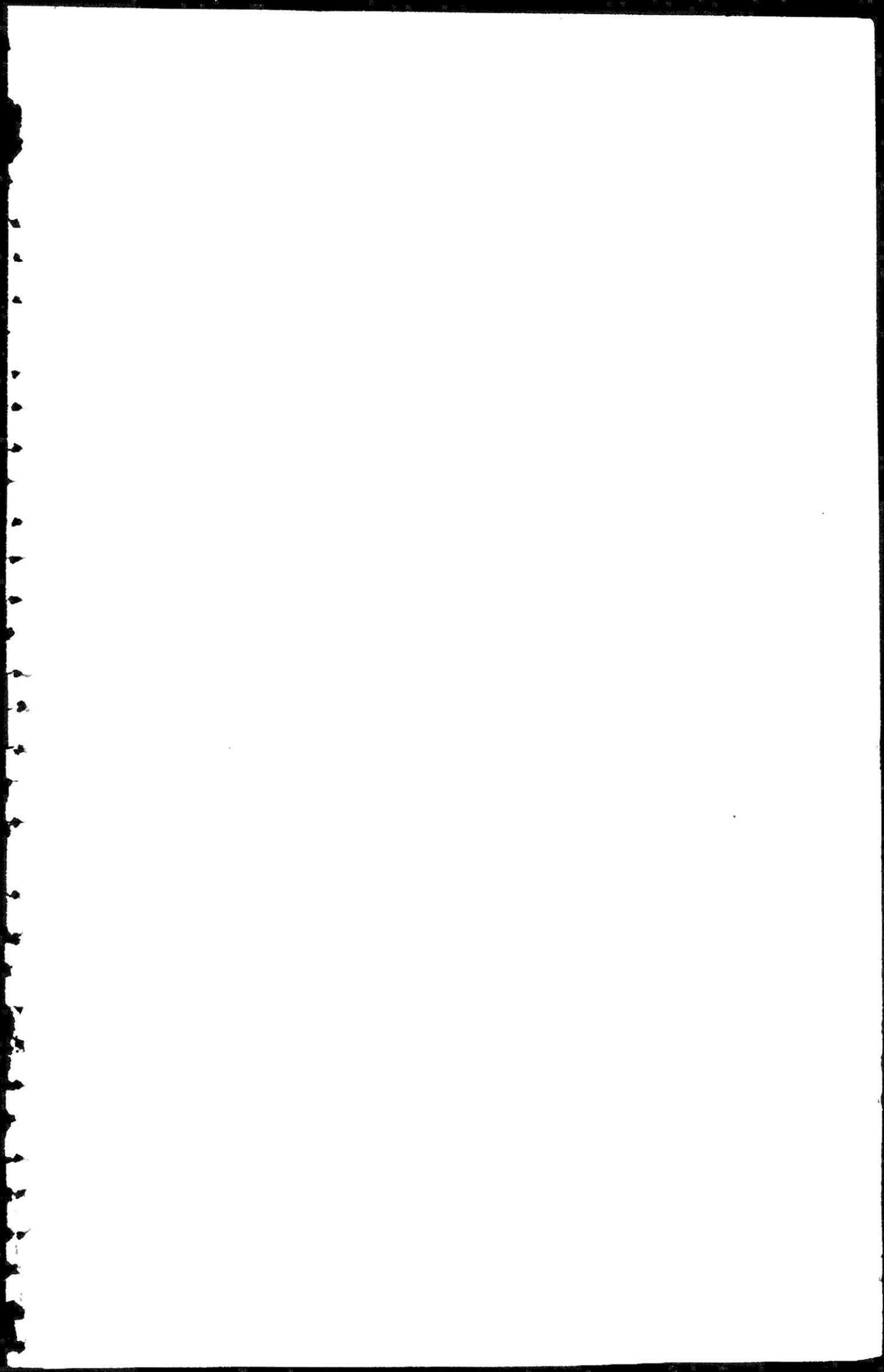
JOSEPH COGITO, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

United States Court of Appeals
For the
District of Columbia Circuit

FILED NOV 5 1951

Joseph W. Stewart
CLERK



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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11052.

FRED S. KOGOD AND CELIA KOGOD, *Appellants*,

v.

JOSEPH COGITO, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

JOINT APPENDIX.

433

Filed Feb 15 1949

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 628-'49.

JOSEPH COGITO, 1728 Webster Street, N. W., Washington,
D. C., *Plaintiff*

v.

FRED S. KOGOD and CELIA KOGOD, *Defendants*

Complaint for Injunction to Remove Obstruction to Easement (Right of Way) and for Damages.

1. Jurisdiction is founded on the general jurisdiction of this Court as provided by the Code of Law for the District of Columbia, Title 11, Sections 301 and 306. The suit is an action for equitable relief and damages and the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

2. The plaintiff, Joseph Cogito, is a citizen of the United States and a resident of the District of Columbia, and brings suit in his own right. The defendants, Fred S. Kogod and Celia Kogod, are citizens of the United States and residents of the District of Columbia, and are sued in their own rights.

3. This suit is filed to compel the defendants to remove an obstruction to an easement (right of way) to which the plaintiff is entitled by deed and by prescription and of which the defendants had both actual and constructive notice.

4. By deed from Charles Seligson, as trustee of Adolf Gobel, Inc. in bankruptcy proceedings, which deed was dated February 4, 1943 and is recorded in Liber No. 7833 at folio 158 of the Land Records of the District of Columbia, there was conveyed to the plaintiff, in fee simple, the following described land in the District of Columbia:

“Part of a tract of land called ‘Fortune Enlarged’ and part of lot numbered five (5) in the division of the Estate of Joshua Beall among his heirs, being part of the tract of land known as ‘Fife’ and ‘Fife Enlarged’ and being part of the land conveyed to the Union Stock Yard Company by deed recorded in Liber 1280 at folio 452 among 434 the Land Records of the District of Columbia, described by metes and bounds as follows:

“Beginning for the same at a point in the Easterly line of the right of way of the Alexandria Branch of the Baltimore and Ohio Railroad, distant South 44° 01' West, 81.64 feet from the intersection of said Easterly line of said right of way with the Southerly line of Benning Road (110 feet wide), and running thence South 37° 42' East 36.34 feet (actual measurement 36.44 feet); thence North 43° 54' East 15.51 feet; thence South 38° 36' East 31.11 feet (actual measurement 31.19 feet), thence South 76° 43' East 13.57 feet (actual measurement 13.60 feet) to a stone; thence South 37° 42' East 65 feet (actual measurement 65.18 feet) to a stone; thence South 39° 21' West 359.90 feet (actual measurement 360.38 feet) to a stone; thence North 50° 39' West 152 feet (actual measurement 152.50 feet) to the said right of way of the Alexandria Branch of the Baltimore and Ohio Railroad; thence along said Easterly line of said right of way, North 39° 21' East 50 feet to a stone; thence continuing along said line of said right of way North 41° 03' East 317.82 feet (actual measurement 318.35 feet) to the place of beginning, as shown upon plats of survey respectively, recorded in the Office of the Surveyor for the District of Columbia in Survey Book 109 at page 485 and Survey Book 142 at page 326, now known for purposes of assessment and taxation as Parcel 168/50;” and the plaintiff is now the owner thereof.

5. In addition to the real property described in paragraph 4 hereof, the aforesaid deed from Charles Seligson also conveyed to the plaintiff “all of the right, title and interest in and to the same of said Adolf Gobel, Inc., together

with any and all right, title and interest or estate which Adolf Gobel, Inc., debtor, or Charles Seligson, as trustee of Adolf Gobel, Inc., debtor, may have or could claim or assert in and to any of the land adjoining the above described property on the North, East or South”

6. The defendants, Fred S. Kogod and Celia Kogod, his wife, as tenants by the entireties, are the owners in fee simple of land to the North, East and South of the property owned by the plaintiff described above.

7. The common source of title of the plaintiff and the defendants was the Union Stock Yard Company, a New Jersey Corporation, which was vested with the fee simple title to the land now owned by both the plaintiff and the defendants on February 26, 1890.

435 8. By an agreement of lease dated February 26, 1890, which was recorded March 18, 1890, and is set forth at large in Liber 1470 at folio 249 of the Land Records of the District of Columbia, the Union Stock Yard Company leased to the Washington Abattoir Co. of West Virginia, a corporation under the laws of West Virginia, part of the grounds then occupied by the Union Stock Yard Company as a stock yard, the same being part of the land now owned by the plaintiff, which lease described the property as:

“Beginning for the same at the corner formed by the face of the wall on the South side of the branch and the fence on the West side of the main alley in said grounds, thence running with the line of the fence South $43\frac{1}{4}^{\circ}$ West 230 feet to a cedar post, thence North with the line of posts $46\frac{3}{4}^{\circ}$ West 120 feet to a post thence South $43\frac{1}{4}^{\circ}$ West with the line of fence 108 feet to a post on the line of an alley, thence North $46\frac{3}{4}^{\circ}$ West 32 feet to the line between the lands of the Baltimore and Ohio Railroad Company and those of the Union Stock Yard Company, thence North eastwardly along said line of division 374 feet to the Northeastward face of the wall near the branch aforesaid and thence along said wall to the place of beginning—a plat of

which said parcel of land is hereto attached Marked 'A' and said Union Stock Yard Company doth also grant, demise and lease unto said party of the second part its successors and assigns the right of way and passage at any and at all times * * * to and from the land so above described and leased over and by way of the strip of land marked 'Driveway' in the aforesaid plat and described as follows:

"Beginning at the intersection of the South line of Benning's Road and the East line of the land of the Baltimore and Ohio Railroad Company and running thence Southwestward along the said East line of said railroad lands to the land above granted and demised, thence Southeast along the Northeast line of said land so granted and demised twenty five feet, thence to said Benning's Road on a straight line distant twenty five feet from said Railroad lands and thence westward to the place of beginning".

9. Attached to and recorded with the lease described in paragraph 8 hereof was a plat and a copy of such plat is attached hereto marked Exhibit "A", and prayed to be read as a part hereof, in which plat the alley described in said lease is shown.

10. The alley shown in the plat referred to in paragraph 9 hereof is an easement of the property now
436 owned by the plaintiff, which has been blocked by the defendants and of which the plaintiff now complains. The plaintiff says that the defendants were bound by constructive notice of said lease and of the easements (rights of way) therein set forth.

11. By deed dated September 20, 1894, recorded in Liber 1946 at folio 283 of the Land Records of the District of Columbia, the Union Stock Yard Company conveyed, in fee simple, to said Washington Abattoir Company of West Virginia a part of the land now owned by the plaintiff, which conveyance included the land described by the lease aforesaid. In the habendum and tenendum clauses of said deed to Washington Abattoir Company of West Virginia aforesaid, the grantor conveyed the land described in said deed,

with the improvements, rights, ways, easement and appurtenance unto and to the use of the said Washington Abattoir Company and its successors forever and the said grantor covenanted that said grantee and its successors shall have, hold and enjoy the land therein conveyed with the easement and appurtenance thereof. The plaintiff claims that the alley show in the plat attached to the lease aforesaid, to which reference is also made in the deed aforesaid, was appurtenant to and an easement of the land described in said deed and the property now owned by the plaintiff is the dominant tenement for an easement (right of way) in the use of such alley and the property now owned by the defendants is the servient tenement for such easement.

12. The Union Stock Yard Company, by deed dated May 24, 1906, which deed is recorded in Liber 3018 at folio 103 of the Land Records of the District of Columbia, conveyed to Michael A. Keane and Nicholas Auth real property adjoining the property theretofore conveyed to Washington Abattoir Company, as referred to hereinabove, the said property conveyed to Keane and Auth being described in said deed as follows:

437 Beginning at a cedar post located and described as being 283 feet from the South wall of the branch and on the West side of the Main alley and running thence North $46\frac{3}{4}^{\circ}$ West and perpendicular to the line of said alley 152 feet to the Baltimore and Ohio Railroad Company's line, thence South West along the line of the Baltimore and Ohio Railroad Company 50 feet, thence South $46\frac{3}{4}^{\circ}$ East parallel with first line 152 feet to the West line of said main alley, thence North $46\frac{3}{4}^{\circ}$ East on West line of said alley 50 feet to the place of beginning, together with all the rights, privileges and appurtenances, easement and rights of way to the same belonging or in any wise appertaining but not including the use of any alley south of the north line of the property hereby conveyed.

13. The plaintiff says that the reference in said last mentioned deed "not including the use of any alley south of

the North line of the property hereby conveyed" means in substance that only that portion of the alley south of the north line of the property thereby conveyed was closed to the said grantees but that the portion of the alley north of the said property line was open to and an easement for the said grantees and their successors in title, and it is this portion of said alley which the plaintiff contends is appurtenant to and an easement of the plaintiff's property and over which the obstruction has been placed by the defendants. The plaintiff says that the defendants were bound by constructive notice of said deed.

14. By various mesne conveyances, documents and court proceedings, the title to the real estate now owned by the plaintiff, described hereinabove, became vested in the plaintiff by the deed recorded in Liber 7833 at folio 158, referred to in paragraph 4 hereof.

15. The defendants own the property adjoining the property of the plaintiff and said property was acquired by them as hereinafter set forth.

16. The Union Stock Yard Company conveyed to the Eastern Development Corporation, by deed dated June 27th, 1941, which deed was recorded on July 9th, 1941 and is set forth in Liber 7637 at folio 43 of the Land Records of the District of Columbia, the property now owned by the defendants described in the paragraph next succeeding.

438 17. The Eastern Development Corporation conveyed to Fred S. Kogod and Celia Kogod, his wife, as tenants by the entireties, by deed dated May 14, 1942, which deed was recorded on May 20, 1942 and is set forth in Liber 7754 at folio 571 of the Land Records of the District of Columbia, the property now owned by the defendants, in which deed the said property is described as follows:

"Part of a tract of land called 'Fortune Enlarged', described as follows: beginning for the same at the intersection of the Southerly line of Benning Road and the West

line of Minnesota Avenue and running thence South 22° 00' West, 55.76 feet; thence South 29° 48' West, 622.53 feet; thence North 64° 23' West, 569.07 feet, thence North 38° 52' East, 127.43 feet; thence South 50° 39' East, 152 feet; thence North 39° 21' East, 359.90 feet; thence North 37° 42' West, 65 feet; thence North 76° 43' West, 13.57 feet; thence North 38° 36' West, 31.11 feet; thence South 43° 54' West, 15.51 feet; thence North 37° 42' West, 36.34 feet; thence North 43° 59' 30" East, 81.64 feet to the Southerly line of said Benning Road; thence with said road, South 79° 01' East, 475.05 feet; subject to the sewer rights of way granted the District of Columbia by deed recorded in Liber 3872 at folio 178 and Liber 3873 at folio 459 of the Land Records of the District of Columbia.

"Less and Excepting Therefrom, However, the following described parcel, namely: Beginning at a point in the Westerly line of Minnesota Avenue at the end of the two following courses and distances from the intersection of the Southerly line of Benning Road with the Westerly line of Minnesota Avenue, (1), South 22 degrees 00 minutes West along the Westerly line of Minnesota Avenue 55.76 feet; (2), South 29 degrees 48 minutes West along the Westerly line of Minnesota Avenue 75 feet to the point of beginning of the property hereby described, and running thence South 29 degrees 48 minutes West along the Westerly line of Minnesota Avenue 217.8 feet; thence Northwesterly at right angles to the Westerly line of Minnesota Avenue 200 feet; thence North 29 degrees 48 minutes East parallel with the Westerly line of Minnesota Avenue 217.8 feet; thence Southeasterly 200 feet to the Westerly line of Minnesota Avenue and point of beginning, containing one (1) acre of land."

18. The plaintiff alleges that a main alley has existed and been in use as an easement for the property now owned by the plaintiff, extending from Bennings Road southwesterly, adjacent to and along the southeasterly side of the property now owned by the plaintiff, for a distance

439 of approximately 500 feet with an approximate width of 25 feet, which alley is paved and used to the full width thereof. The plaintiff also alleges that another alley, auxiliary to said main alley, has existed and been in use as an easement for the property now owned by the plaintiff, adjacent to and along the northeasterly side of plaintiff's property, extending in a northwesterly direction for approximately 117 feet, from an intersection with the main alley aforesaid, with an approximate width of 30 feet at its intersection with said main alley and an approximate width of 40 feet at the northwesterly end, which auxiliary alley is also paved and used to the full extent of the width thereof. The last mentioned alley is and has been used as an auxiliary alley to the main entrance to the first floor of a building upon plaintiff's property, in conjunction with use of the main alley aforesaid, and the said main alley is also used for and is the primary access to and from the southwesterly portion of the property now owned by the plaintiff.

19. The plaintiff charges and alleges that the defendants contend that there is a lack of continued use of the easement claimed by the plaintiff and that any prescriptive rights of the plaintiff have been lost. The plaintiff says that the easement claimed by the plaintiff is appurtenant to the property of the plaintiff, by reason of the conveyances hereinabove referred to, as well as an implied grant of an easement for use of the alleys established by the common source of title of the parties hereto, for egress and ingress to the property now owned by the plaintiff. In addition, the plaintiff claims that the said easement in the use of the alleys referred to herein has been available to and used for the property now owned by the plaintiff for more than 20 years last preceding and the said alleys are shown on plats, photographs and documents for more than 20 years and the use thereof has been uninterrupted, continuous and adverse to the owners of the property now owned by the defendants for more than 20 years and the plaintiff has a pre-

440 scriptive right to the use of such easement. The plaintiff says that, if such easement were not used at any time, the only time such easement was not used was during a period when the property was vacant and unoccupied occasioned by a controversy of the then owners of said property with officials of the Federal government and the District of Columbia, concerning an enlargement of abattoir facilities on such property, but at all other times, both before and after such non-occupancy, the said easement was used for the benefit of the property now owned by the plaintiff; and, the plaintiff claims that any lack of continued use of the easement aforesaid, during any such period of non-occupancy of such property by reason of the controversy aforesaid, was not an abandonment of plaintiff's prescriptive right to such easement and during such period of non-occupancy nothing was done by the defendants or their predecessors in title to close or obstruct said easement. The plaintiff claims that the property now owned by the plaintiff as aforesaid is the dominant tenement of an easement appurtenant over the property owned by the defendants and the property owned by the defendants is the servient tenement to such easement appurtenant, by reason of the conveyances aforesaid, the implied grant to the plaintiff and his predecessors in title, and the prescriptive rights of the plaintiff and his predecessors in title, of which the defendants had actual and constructive notice.

20. The plaintiff alleges that the defendants at the time of the conveyance to them of the property owned by them, as described in paragraph 17 hereof, were charged with constructive and actual notice of the easement and right of way to which the plaintiff is entitled over the defendants' property southerly, easterly and northerly of the plaintiff's property.

21. Ever since the plaintiff took title to the real property described in paragraph 4 hereof on the 4th day of February 1943, and for 20 years prior to the time that the plaintiff took title, the said alleys on the Northeasterly

441 and Southeasterly sides of his property have been used by him and his predecessors in title in their occupation of said property for the purposes of alleys and for egress and ingress to the property now owned by the plaintiff, and said use has been uninterrupted, notorious, hostile and adverse to anyone who attempted to close the same. The defendants at various times, since they took title to the property owned by them, have threatened to block said alleys and excavate in said alleys and on each such occasion the plaintiff has protested and the defendants then abandoned such threatened actions, except on the occasion now complained of. The plaintiff alleges that he not only has right by way of prescription to the said use of said easement and right of way but he has title by way of conveyance or implied grant, for the necessary use of the property acquired by him, through his predecessors in title, as above described, and that no one has ever had the right to block said alleys or to prevent the plaintiff having ingress and egress over said alleys to his own place of business.

22. Part of the property owned by the defendants is occupied by a moving picture theater, known as the Senator Theater. The defendants on Friday, February 4th, 1949, in the late afternoon, erected a barricade over said easement aforesaid, consisting of a number of posts placed in the main alley aforesaid, blocking the entrance so as to prevent the traffic of automobiles, trucks and other vehicles over, along and through the said alley, appurtenant as an easement to plaintiff's property, and placed on said posts a sign to the effect that it could be used for parking space for said Senator Theater and, notwithstanding the protest of the plaintiff to the defendants, persist in saying that they were within their rights in erecting said posts and signs.

23. The property owned by the plaintiff has always been and is now used for commercial purposes. The plaintiff has erected and rebuilt thereon several large build-
 442 ings, one of which is used for a warehouse and the others are used for other commercial purposes. In-

gress and egress to said buildings are of prime importance to the plaintiff. The barricade erected by the defendants has prohibited the use of and barred one of the essential entrances to said buildings and will, if continued, affect materially the value of the plaintiff's land for commercial purposes, and entirely prevent access to a portion of plaintiff's property. The plaintiff says that each time the defendants heretofore have indicated their intention to erect barriers across said alleys or otherwise interfere with the use thereof he has vehemently protested and told the defendants that they had no right to erect such barriers or prevent the use of such alleys and that, if they did so, they would be called to account for any damage sustained by the plaintiff. Notwithstanding the position that the plaintiff has taken, the defendants have erected the barrier aforesaid and the plaintiff says such interference of plaintiff's use of said alley is a willful and malicious tort practiced by the defendants upon the plaintiff.

24. The main alley and the auxiliary alley aforesaid described in paragraph 18 hereof, are shown on a "Plot Plan" of of the Stock Yards Property, a copy of which "Plot Plan" is attached hereto marked Exhibit "B" and made a part hereof. All the property now owned by the plaintiff with the easements appurtenant thereto are shown in the "Plot Plan" aforesaid, Exhibit "B" hereof. The plaintiff says that, at the time he acquired ownership of the property hereinabove described, the main alley aforesaid was an easement appurtenant to the property conveyed to him and the only means of ingress and egress to and from part of the westerly portion of the property now owned by him. The alley, over which the defendants have placed the barrier aforesaid is shown on the Plat, copy of which is filed herewith as Exhibit "A", and is referred to in the lease and the deeds described in paragraphs 8, 11 and 12 hereof as the "main alley". A description of said alley, over which the defendants have placed the barrier aforesaid, based on the course shown in the plat

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and lease described in paragraph 8 hereof and reference to the markers described in said lease and the deed described in paragraph 11 hereof, is as follows:

Beginning for the same at the corner formed by the face of the wall on the South side of the branch and the fence on the West side of the main alley in the grounds formerly occupied by the Union Stock Yard Company as a stock yard, as shown in a plat attached to a lease recorded in Liber 1470 at folio 249 et seq. of the Land Records of the District of Columbia (the said point of beginning being the same point of beginning for the demise and conveyances described in the said lease and a deed recorded in Liber 1946 at folio 283 of said Land Records); thence running with the line of the said fence, mentioned in said lease and deed, south $43\frac{1}{4}$ degrees West 283 feet; thence running South $46\frac{3}{4}$ degrees East 25 feet; thence North $43\frac{1}{4}$ degrees East, parallel to the first line and distant 25 feet therefrom along the East line of said alley, to Bennings Road, approximately 503 feet; thence westerly along the southerly line of Bennings Road a distance of 25 feet; thence South $43\frac{1}{4}$ degrees West, along the west line of said Alley, approximately 220 feet, to the point of beginning; the courses described above being subject to correction and adjustment for deviation and variation in the marks of the compass during the intervening years.

WHEREOF the plaintiff demands judgment as follows:

1. That the defendants be permanently and temporarily enjoined from erecting and maintaining said barrier across said easement (right of way) and required by mandatory process of this Court to remove the same.

2. That the defendants be permanently and temporarily enjoined to keep open the easement in the alleys described in the complaint.

3. That the defendants pendente lite be enjoined and required to remove the barrier erected over the alley, as described in this complaint, and enjoined and required to maintain the status quo ante of the easement in said alley during the pendency of this suit.

4. That the plaintiff be awarded a money judgment against the defendants in the sum of ten thousand (\$10,000) dollars for compensatory and punitive damages.

444 5. And for such other and further relief as the nature of the case may require and to the Court seem right and just.

JOSEPH COGITO.

H. WINSHIP WHEATLEY.

H. WINSHIP WHEATLEY, JR.,
1010 Vermont Avenue N. W.,
Washington, D. C.
Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, SS:

Joseph Cogito, being first duly sworn on oath, deposes and says that he is the plaintiff in the above entitled cause; that he has read the foregoing complaint by him subscribed and knows the contents thereof; and the facts stated therein are true.

JOSEPH COGITO.

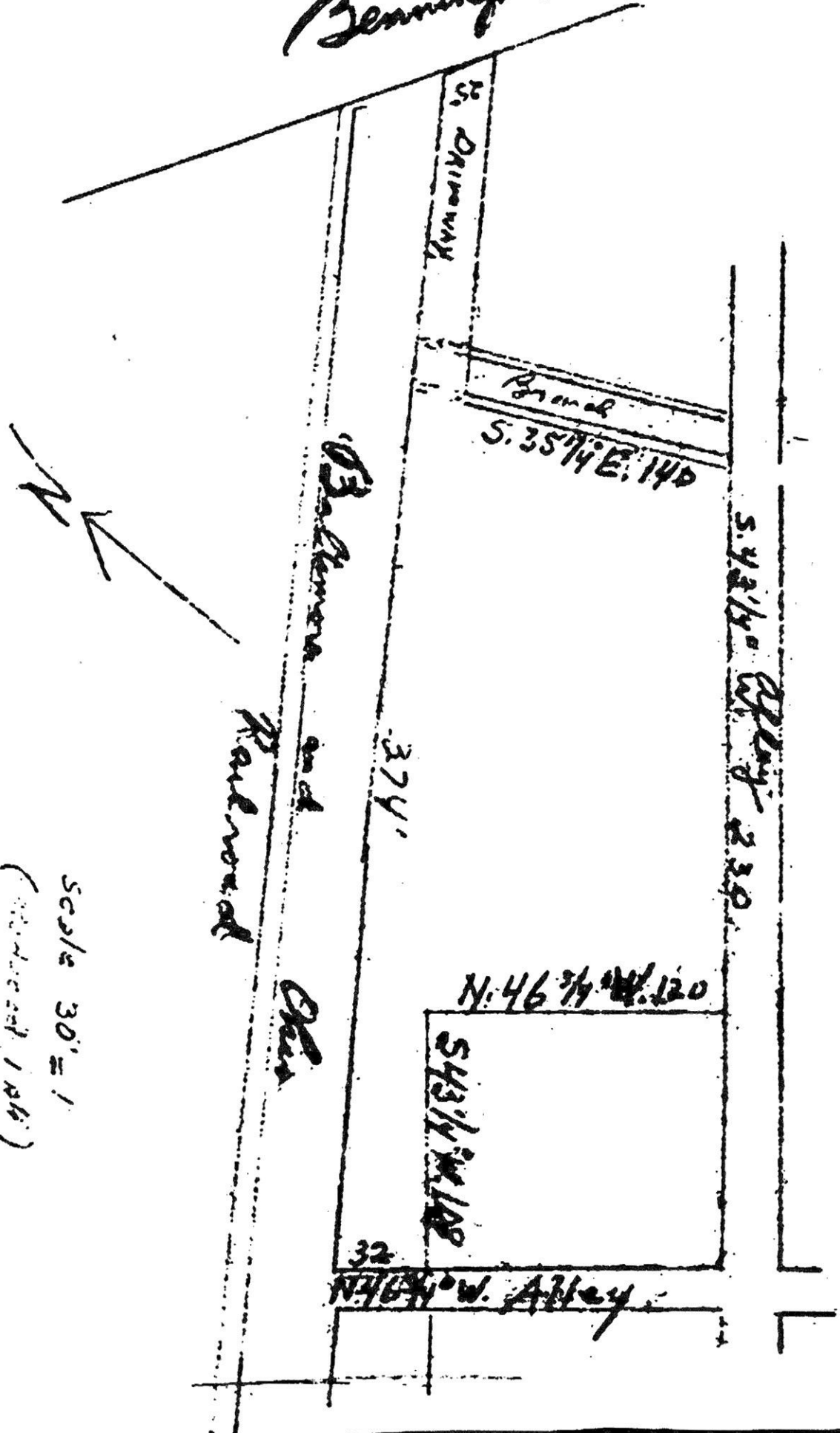
Subscribed and sworn to before me this 12th day of February 1949.

[NOTARIAL SEAL]

MABEL L. CLOPTON,
Notary Public.

Copy of Plot Shown in Lib. 1470 at
folio 255 of Land Records of District of Columbia

Benning Road



Filed Mar 7 1949

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel of record as follows:

1. That the status quo existing between the parties to this action prior to February 4, 1949, with reference to the alleged easement and alley shall be maintained.

2. The defendants agree to remove any barricades, barriers, posts or signs blocking and preventing passage over and through said alleged easement and alley.

3. This stipulation is without prejudice to any rights of the plaintiff or the defendants, and is subject to any and all defenses which may be interposed by said defendants. Defendants deny that there is any easement or right-of-way in favor of the plaintiff as alleged in the complaint, and enter into this stipulation with the distinct understanding and agreement that it shall not constitute an admission of any such easement or right-of-way.

Dated this 5th day of March, 1949.

H. WINSHIP WHEATLEY

H. WINSHIP WHEATLEY, JR.

1010 Vermont Ave., N. W.

Washington 5, D. C.

Attorney for Plaintiff.

GROSSBERG, YOCHELSON & BRILL

by: IRVING B. YOCHELSON

Attorney for Defendants.

1709 H Sts., N. W.

Washington, D. C.

• • • • •

Filed Jul 29 1949

Answer.**FIRST DEFENSE.**

The complaint fails to state a claim upon which relief may be granted as against these defendants.

SECOND DEFENSE.

1. Defendants admit the jurisdiction of this Court.

2. Defendants are without knowledge as to the citizenship and residence of said plaintiff and, therefore, neither admit nor deny the allegation with reference thereto. They admit the allegation of said paragraph with respect to their citizenship and residence.

3. Defendants deny that they ever obstructed any easement or right-of-way belonging to the plaintiff. They further deny that said plaintiff has an easement or right-of-way either by deed or prescription, and they deny any actual or constructive notice of any such alleged easement or right-of-way.

4. Upon information and belief, defendants admit that the property described in said paragraph was conveyed to said plaintiff as in said paragraph alleged and that the plaintiff appears to be the owner of record.

448 5. Upon information and belief, defendants admit the deed from said Charles Seligson as the same appears of record purports to convey all of the right, title and interest of Adolf Gobel, Inc., and said Charles Seligson as Trustee of Adolf Gobel, Inc., in and to the land described in paragraph 4 of the complaint, and in and to any of the land adjoining said property on the north, east or south.

6. The allegations of said paragraph are admitted.

7. The allegations of said paragraph are admitted.

8. The allegations of said paragraph are admitted.

9. Defendants admit that the plat referred to in said paragraph was attached to and recorded with the lease described in paragraph 8 of the complaint. They believe the

copy attached to said complaint as Exhibit A is a true copy, but for greater certainty refer to the original thereof. They deny the remaining allegations of said paragraph.

10. Each and all of the allegations of said paragraph are denied.

11. Upon information and belief, defendants admit that Union Stock Yard Company conveyed to Washington Abattoir Company of West Virginia part of the land of which the plaintiff appears to be the owner of record. For the contents of said conveyance, defendants refer to the original thereof or the record of the same as it appears in the Office of the Recorder of Deeds for the District of Columbia. Defendants deny each and all of the remaining allegations of said paragraph.

12. Upon information and belief, defendants admit that the Union Stock Yard Company conveyed the land in said paragraph mentioned by deed recorded in Liber 3018 at folio 103 of the Land Records of the District of Columbia. Said conveyance was to Michael A. Keane and Nicholas

Auth, as Trustees, in and upon the trusts therein declared, and defendants say that a true construction of said conveyance does not give any easement or right-of-way in said so-called alley.

13. Each and all of the allegations of said paragraph are denied.

14. Upon information and belief, defendants admit that according to the records, said plaintiff is the owner of the real estate referred to in said paragraph and more particularly described in paragraph 4 of the complaint.

15. The allegations of said paragraph are admitted.

16. The allegations of said paragraph are admitted.

17. The allegations of said paragraph are admitted.

18. Each and all of the allegations of said paragraph are denied. If any easement ever existed, it was abandoned more than twenty years prior to the filing of this action. The buildings now occupied by the plaintiff were abandoned for many years, were permitted to remain in a state of

ruin, and no use was made of them, or the so-called alley for more than twenty years prior to the filing of this suit.

19. The allegations of said paragraph are denied.

20. The allegations of said paragraph are denied.

21. The allegations of said paragraph are denied. On several occasions, said plaintiff promised these defendants that he would not use, or permit his trucks to use, any portion of the land owned by these defendants, including that alleged to form a part of the easement or right-of-way claimed by said plaintiff. Notwithstanding his said agreement, and in violation thereof, said plaintiff used and permitted his trucks to use the land of these defendants, and as a result, these defendants were compelled to erect
450 a barricade for the protection and preservation of their land and property. The remaining allegations of said paragraph are denied.

22. Defendants admit that they erected a barricade, as set forth in the preceding paragraph of this answer. Such barricade was necessary and was resorted to for the preservation and protection of their property. The remaining allegations of said paragraph are denied.

23. Defendants admit that the property, to which the plaintiff holds title of record, falls within the general classification of commercial property. Defendants deny the remaining allegations of said paragraph. They further say that said plaintiff has full and complete ingress and egress to all of the property standing in his name by using the driveway shown on Exhibit A attached to the complaint, and the easement asserted by said plaintiff is not necessary in order to afford him full and complete enjoyment of said property.

24. On information and belief, defendants admit that Exhibit B is a copy of a "plot" plan, and that the property to which the plaintiff appears to be the record owner is shown thereon. The remaining allegations of said paragraph are denied.

THIRD DEFENSE.

The property over which the plaintiff claims an easement has not been used for an alley for ingress or egress for more than twenty years prior to the filing of this action. If any easement was ever created, by implication or otherwise, it was abandoned and extinguished by non-user, relinquishment and surrender more than twenty years prior to the institution of this suit, and more than twenty years prior to the date when said plaintiff acquired the record title to the property described in said complaint.

451 WHEREFORE defendants pray that they may be hence dismissed with their costs in this behalf incurred.

GROSSBERG, YOCHELSON & BRILL
1709 H Street, N. W.,
Washington, D. C.,

BRANDENBURG & BRANDENBURG
By LOUIS M. DENIT
719 15th Street, N. W.,
Washington, D. C.,
Attorneys for Defendants.

* * * * *

452 Filed Feb 20 1951.

Pretrial Proceedings.

Statement of Nature of Case:

Complaint for injunction to remove obstruction to right of way, and for damages.

Plaintiff claims right of way through defendant's property acquired by deed or by prescription; plaintiff on Feb. 4, 1943 acquired certain commercial property in the rear of Benning and Anacostia Roads, N. E., from trustee in bankruptcy for Adolf Gobel, Inc., together with all right, title, or interest of Gobel in adjoining land north, east, and south; defendants on May 14, 1942, acquired the adjoining prop-

erty north, east and south of plaintiff's property; both properties were originally part of tract owned by Union Stock Yard Company; in 1890 Union leased part of land now owned by plaintiff to Washington Abattoir Company of West Virginia, together with right of way at any and all times to and from leased land over alley through land which is now defendants'; in 1894 same parcel was conveyed by Union to Washington Abattoir Company together with the easement, and in 1906 Union conveyed an adjoining part of the tract to Keane and Auth, together with easements appurtenant thereto; that both of these tracts now are owned by plaintiff; that defendants had constructive notice of easements through the deeds; that a main alley adjacent to and along the SE side of plaintiff's property and an auxiliary alley adjacent to and along NE side of plaintiff's property have existed and been used as an easement for his property and said alleys have been shown on plats, photographs, and documents, for more than 20 years and that the use has been uninterrupted, continuous and adverse to the

owners of the property now owned by defendants,
 453 and a prescriptive right to use of the easement in said alleys has been acquired thereby; that if the easement was not used at any time it was during the time the property was vacant and unoccupied due to a controversy with the Federal and District of Columbia Governments concerning enlargement of the abattoir facilities; that such failure to use the easement did not constitute abandonment; that defendants at various times threatened to obstruct the alleys and excavate in them, but plaintiff protested and defendants abandoned their threatened action, till occasion when defendants put posts across main alley and placed signs that it could be used for parking by patrons of theater on their property; plaintiff alleges use of alley essential to use of his commercial property.

Defendants admit ownership of properties involved and admit they erected barricade across alleged right of way; defendants deny existence of easement or right of way, ex-

press or implied, and claim, if any easement appurtenant to plaintiff's land through defendants' property ever existed, it was abandoned more than 20 years prior to this suit; that buildings now occupied by plaintiff were abandoned for many years, remained in state of ruin, and no use was made of them or alleged alley for more than 20 years prior to filing of suit. Defendants further claim plaintiff promised defendants on several occasions he would not use or permit his trucks to use any portion of the land owned by defendants, including alleged easement or right of way now claimed by plaintiff; that plaintiff used and permitted his trucks to use their property, and they were compelled to erect barricade for protection of their property. Defendants deny the easement is necessary to plaintiff's full use and enjoyment of his property.

STIPULATIONS:

Area in question was blocked by defendants; defendants admit erection of barricade for purpose of preventing use by any one other than defendants or their permittees.

Plaintiff's chain of title derived through mesne conveyances of property described in paragraphs 4, 5, and 14. Defendants deny easement or right of way, express, or implied.

454 Cogito v. Kogod # 3

C. A. 628-49

Defendants' chain of title derived through mesne conveyances to defendants of property described in paragraphs 6, 15, 16, and 17.

That a Bennings Viaduct was completed in 1919 (date subject to verification).

Stipulated that the following documents be received without formal proof:

Deed to Union Stock Yard Co. dated October 14, 1887, recorded November 15, 1887, at Liber 1280, Folio 452.

Deed to plaintiff dated February 4, 1943, recorded February 11, 1943, at Liber 7833, Folio 158.

Plaintiff's Exhibit B attached to Complaint, to be used for orientation purposes only.

Stipulated that the following documents be received without formal proof, subject to test of relevancy and materiality:

Lease from Union Stock Yard Co. to Washington Abattoir Co., dated February 26, 1890, recorded March 18, 1890, at Liber 1470, Folio 249, with plat.

Deed from Union Stock Yard Co. to Washington Abattoir Co. dated September 20, 1894, recorded September 22, 1894, at Liber 1946, Folio 283.

Deed from Union Stock Yard Co. to Michael A. Keane and Nicholas Auth, dated May 24, 1906, recorded May 29, 1906, at Liber 3018, Folio 103.

Deed from Washington Abattoir Co. to Andrew Loeffler, Michael Keane, and Nicholas Auth, dated December 31, 1904, recorded January 3, 1905, at Liber 2893, Folio 177.

Mortgage from Union Stock Yard Co. to American Security & Trust Co., dated January 1, 1910, recorded January 4, 1910, at Liber 3271, Folio 475.

Deed from Andrew D. Loeffler and Michael A. Keane to Washington Abattoir Co., dated May 22, 1916, and recorded May 25, 1916, at Liber 3869, Folio 275.

Deed from Union Stock Yard Co. to A. Loeffler Provision Co., dated June 22, 1928, recorded June 23, 1928, at Liber 6172, Folio 35.

Deed from A. Loeffler Provision Co. to Keane-Loeffler, Inc., dated July 6, 1928, recorded July 6, 1928, at Liber 6177, Folio 261.

Photostat of plat on record with Surveyor, D. C., October 31, 1906. Plat 168.

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C. A. 628-49

Plat of survey by D. C. Surveyor, January 14, 1943.

Baist Plat Book, Vol. 4, Plate 14 (1910).

Hopkins Plat Book, Vol. 3, Plate 28 (1894).

Plaintiff's photographs of 10/20/42, initialed by Court.

R. B. KEECH

Pretrial Judge.

Date—February 2, 1951.

Attorneys authorized to act:

H. WINSHIP WHEATLEY,

By H. WINSHIP WHEATLEY, JR.,

Plaintiff

BRANDENBURG & BRANDENBURG,

By LOUIS M. DENIE,

Defendant.

ADDITIONAL STIPULATIONS:

The common source of title of plaintiff and defendants was Union Stock Yard Company, which was vested with fee simple title to the land now owned by both plaintiff and defendants on February 26, 1890. The plaintiff and defendants, respectively, own the properties described in the complaint through chains of title, derived by mesne conveyances, from such common source of title.

Admit that area claimed as easement by the plaintiff is correctly described in paragraph 18 of the complaint as main alley and auxiliary alley, although the defendants deny an easement or right of way, express or implied, therein.

H. WINSHIP WHEATLEY,

By H. WINSHIP WHEATLEY, JR.

Filed Apr 23 1951

Findings of Fact and Conclusions of Law.**FINDINGS OF FACT**

The Court finds the facts as follows:

1. This action is to enjoin an obstruction to and keep open an easement which the plaintiff claims by grant, implied grant, and by prescription in an easement (right of way) adjoining the easterly and northerly sides of plaintiff's real property.

2. The plaintiff claims that rights of way exist on the northerly and easterly sides of plaintiff's real property for general purposes of passage for ingress and egress to plaintiff's real property.

3. The plaintiff concedes that the defendants also have the right to use said rights of way for general purposes of passage for ingress and egress to property abutting and adjacent to such rights of way.

4. The area in controversy includes real property which was at one time owned in its entirety by the Union Stock Yard Company.

5. Various activities, over a period of years continuously from 1894, have been conducted on the real property now owned by the plaintiff.

6. Rights of way on the easterly and northerly sides of the real property now owned by the plaintiff have been used by the plaintiff and his predecessors in title in their occupancy of such real property for general purposes
457 of passage for ingress and egress thereto and such use has been uninterrupted, continuous, open, notorious, hostile, and adverse for such general purpose of passage for ingress and egress to such property since prior to the year 1906.

7. The plaintiff is the owner of real property situate in the District of Columbia, known for purposes of assessment and taxation as parcel 168/50, fully described in paragraph numbered 4 of the complaint, and the improvements

thereon consisting of buildings used for industrial and commercial purposes.

8. The Union Stock Yard Company, by deed dated October 14, 1887, recorded November 15, 1887 in Liber 1280 at folio 452 of the Land Records of the District of Columbia, was vested with title to the real property now owned by the plaintiff and the real property on the north thereof to Bennings Road and on the east thereof to Anacostia Road now known as Minnesota Avenue.

9. An easement (right of way) exists and is now in use, and has been in existence and continuously used since prior to the year 1906, in a passageway, designated on official documents as an alley, extending from Bennings Road southerly, approximately 503 feet, by a width of 25 feet, part of which is and was adjacent to and along the easterly side of the property now owned by the plaintiff, which passageway or alley has been used for general purposes of ingress and egress by the plaintiff and his predecessors in title, and by other abutting property owners adjacent thereto, and by anyone having business in the real property abutting thereon, and the public in connection with the business activities conducted upon the properties abutting and adjacent to the same, since prior to the year 1906, which passageway or alley is referred to hereinafter as the main alley.

10. Another easement (right of way) exists and is now in use, and has been in existence and continuously used since prior to the year 1906, in another passageway, designated on a survey plat filed in the Office of the Surveyor of the District of Columbia as an alley, extending
458 from the westerly side of the main alley, described in the paragraph next preceding, in a westerly direction for 117 feet, adjacent to and along the northerly side of plaintiff's real property, which now has a width of 30 feet at the easterly end thereof and a width of 40 feet at the westerly end thereof, which passageway or alley has been used for general purposes of ingress and egress by

the plaintiff and his predecessors in title, and by other property owners adjacent thereto, and by anyone having business in the real property abutting thereon, and the public in connection with the business activities conducted upon the real properties abutting and adjacent to the same since prior to the year 1906, which passageway or alley is referred to hereinafter as the auxiliary or subsidiary alley.

11. The passageway, hereinabove referred to as the main alley, on the easterly side of the real property now owned by the plaintiff and the passageway, hereinabove referred to as the auxiliary or subsidiary alley, on the northerly side of the real property now owned by the plaintiff are shown, designated and identified as alleys on an official plat of the real properties then owned by said Union Stock Yard Company, adjacent and abutting upon the property now owned by the plaintiff, which plat was filed in the Office of the Surveyor of the District of Columbia on March 11, 1906.

12. The passageway hereinabove referred to as the main alley and the passageway hereinabove referred to as the auxiliary or subsidiary alley are shown on a photograph of the scene taken prior to the year 1919. The intersection of the passageway, referred to herein as the main alley, with Benning Road is shown on a photograph of the scene taken on July 6, 1939. The location of the passageway referred to as the main alley is shown and designated as an alley on a plat filed for record in the Office of the Surveyor of the District of Columbia, on October 31, 1906, designating for purposes of assessment and taxation part of the

459 real property now owned by the plaintiff. The location of the passageway, referred to herein as the main alley, is shown in a plat made by the Engineer for Bridges, District of Columbia, on March 4, 1920. The locations of the passageway referred to herein as the main alley and the passageway referred to as the auxiliary or subsidiary alley are shown on Plot Plan, filed in the Office of the Building Inspector of the District of Columbia with an application for work to be done on improvements to the

real property now owned by the plaintiff, which was approved in 1936 by the Building Inspector.

13. The passageway, herein referred to as the main alley, on the easterly side of the real property now owned by the plaintiff is shown and designated as an alley on a plat recorded with a lease from the Union Stock Yard Company to the Washington Abattoir Company dated February 26, 1890 and recorded March 18, 1890 in Liber 1470 at folio 249 of the Land Records of the District of Columbia, in which lease the property thereby demised was bounded on the easterly side thereof by said alley.

14. Part of the land now owned by the plaintiff was conveyed by the Union Stock Yard Company, then the owner thereof, to the Washington Abattoir Company, by deed dated September 20, 1894, recorded on September 22, 1894 in Liber 1946 at folio 283 of the Land Records of the District of Columbia, which real property was bounded on the easterly side thereof by said main alley shown on the plat recorded with the lease described in the paragraph next preceding:

15. Another part of the land now owned by the plaintiff, the southerly 50 feet by the full depth thereof, was conveyed by the Union Stock Yard Company, then the owner thereof, to one of the plaintiff's predecessors in title, by deed dated May 24, 1906, recorded on May 29, 1906 in Liber 3018 at folio 103 of the Land Records of the District of Columbia, which property was bounded on the easterly side thereof by said main alley, shown on the plat recorded with the lease described in paragraph numbered 13 hereof, and

there was conveyed to the said grantee therewith all
460 the rights, privileges and appurtenances, easements
and rights of way to the same belonging or in any-
wise appertaining but not including the use of any alleys
south of the north line of the property thereby conveyed.

16. The passageway herein referred to as the main alley and the passageway herein referred to as the auxiliary or subsidiary alley are shown on a topographic survey sheet

of the US Coast and Geodetic Survey, published in 1895, of a topographic survey made by the US Coast and Geodetic Survey in 1887-1891.

17. The passageway herein referred to as the main alley was and is paved with cobble stones at its intersection with Bennings Road and was and is paved with cobble stones along side and adjacent to the property now owned by the plaintiff and a roadway for passage of vehicular and pedestrian traffic existed and is in existence from Bennings Road southerly for ingress and egress to the property now owned by the plaintiff on the easterly side thereof.

18. The evidence proves that the right of way extending southerly from Bennings Road has been used continuously, openly and adversely since prior to the year 1906 for general purposes of passage for ingress and egress to the real property now owned by the plaintiff and the real property abutting thereon.

19. The evidence proves that the right of way abutting the northerly side of plaintiff's real property herein referred to as the auxiliary or subsidiary alley has been used continuously, openly and adversely since prior to the year 1906 for general purposes of passage for ingress and egress to the real property now owned by the plaintiff and the real property abutting thereon.

20. The Court find from a personal inspection in the presence of counsel on the site that the passageway herein referred to as the main alley and the passageway herein referred to as the auxiliary or subsidiary alley exist in fact and are now used for general purposes of passage for ingress and egress to the real properties abutting thereon and the appearance thereof shows the use thereof
461 for many years for general purposes of passage for ingress and egress to the properties abutting thereon.

21. The evidence establishes that the predecessors in title of the plaintiff and defendants had access to their respective real properties, in so far they needed access

thereto, at all times, by use of the passageways herein referred to as the main alley and auxiliary or subsidiary alley; it was intended that such passageways were to be kept open; gates across such passageway were used as a matter of convenience, to keep in the hogs and cattle and direct their passage into different pens from such passageways, not to indicate a closing in or obstruction of such passageway for access use.

22. The evidence does not establish that the plaintiff and his predecessors in title used the rights of way, herein referred to as the main alley and auxiliary or subsidiary alley, by permission.

23. The use of the rights of way herein referred to as the main alley and the auxiliary or subsidiary alley for general purposes of passage for ingress and egress is appurtenant to and an easement of the property now owned by the plaintiff.

24. The plaintiff and his predecessors in title have not abandoned any right to use the rights of way herein referred to as the main alley and the auxiliary or subsidiary alley existing on the easterly and northerly sides of the real property now owned by the plaintiff.

25. The evidence does not establish that the defendant and his predecessors in title closed the passageways by exclusive, notorious, adverse and hostile possession, under claim of right.

26. No evidence was adduced that the plaintiff, or his predecessors in title, abandoned the right to use the rights of way herein referred to as the main alley and auxiliary or subsidiary alley.

27. The defendants, by mesne conveyances from the Union Stock Yard Company subsequent to convey-
 462 ances from said Union Stock Yard Company to plaintiff's predecessors in title, acquired title to real property on the north and east of the real property now owned by the plaintiff with actual and constructive notice of the existence of the rights of way, herein referred to as

the main alley and auxiliary or subsidiary alley, as easements and appurtenances of plaintiff's real property.

28. The defendants on February 4, 1949, erected a barricade across the right of way herein referred to as the main alley and obstructed use thereof by the plaintiff.

29. The areas included within the easement in the rights of way herein referred to as the main alley and the auxiliary or subsidiary alley are described in paragraph numbered 18 of the complaint. The lines of the right of way herein referred to as the main alley are set out in paragraph numbered 24 of the complaint. The lines of the right of way herein referred to as the auxiliary or subsidiary alley extend, from the northeasterly corner of the real property now owned by the plaintiff, northerly along the westerly line of the right of way hereinabove referred to as the main alley a distance of 30 feet, thence westerly parallel to the northerly line of the conveyance recorded in Liber 1946 at folio 283 of the Land Records of the District of Columbia to the easterly line of a paved road at a point 25 feet distant from the easterly line of the right of way of the Baltimore & Ohio Railroad (said paved road being designated as a "driveway" on the plat attached to the lease recorded in Liber 1470 at folio 249 of said Land Records), thence southerly parallel to the easterly line of the right of way of said Baltimore & Ohio Railroad and 25 feet distant therefrom to the northerly line of the property now owned by the plaintiff, thence easterly along and with the northerly lines of the real property now owned by the plaintiff to the place of beginning.

CONCLUSIONS OF LAW

On the foregoing findings of fact, the Court states
463 its conclusions of law as follows:

1. The plaintiff is entitled to a judgment that the defendants be permanently enjoined from erecting and maintaining any barrier or obstruction across, or otherwise preventing the use of, the easement and rights of way abutting on the easterly and northerly sides of the real property

now owned by the plaintiff described in the complaint; and the defendants be required to maintain the status quo existing between the parties to this cause prior to February 4, 1949 with respect thereto.

2. The plaintiff is entitled to judgment that the rights of way abutting on the easterly and northerly sides of the real property owned by the plaintiff are easements of and appurtenant to the real property now owned by the plaintiff and be kept open for general purposes of passage for ingress and egress thereto.

3. The plaintiff is entitled to judgment in conformity with these conclusions of law and for costs.

April 20th, 1951

T. ALAN GOLDSBOROUGH
Judge

Seen:

BRANDENBURG & BRANDENBURG

By: A. LECKIE COX

Attorneys for Defendants.

* * * * *

464

Filed Apr 23 1951

Final Judgment.

This cause came on for final hearing and it is thereupon this 23rd day of April, 1951,

ADJUDGED and ORDERED as follows:

1. The defendants Fred S. Kogod and Celia Kogod be, and hereby are, permanently enjoined from erecting and maintaining any barrier or obstruction across, or otherwise preventing the use of, the easement and rights of way described in the paragraph next succeeding; and, said defendants be, and hereby are, required to remove any barricade, barrier, posts, sign or obstruction erected by them, their agents or employees, blocking and preventing passage and traffic of vehicles and pedestrians, over, along and through

the easement and rights of way described in the paragraph next succeeding.

2. The rights of way described as follows:

Beginning for the same at the corner formed by the face of the wall on the South side of the branch and the fence on the West side of the main alley in the grounds formerly occupied by the Union Stock Yard Company as a stock yard, as shown in a plat attached to a lease recorded in Liber 1470 at folio 249 et seq. of the Land Records of the District of Columbia (the said point of beginning being the same point of beginning for the demise and conveyance described in the said lease and a deed recorded in Liber 1946 at folio 283 of said Land Records); thence running with the line of the said fence, mentioned in said lease and deed, South $43\frac{1}{4}$ degrees West 283 feet; thence running South $46\frac{3}{4}$ degrees East 25 feet; thence North $43\frac{1}{4}$ degrees East, parallel to the first line and distant 25 feet therefrom, along the East line of said alley, to Bennings Road; thence westerly
465 along the southerly line of Bennings Road a distance of 25 feet; thence South $43\frac{1}{4}$ degrees West, along the West line of said alley, to the point of beginning; the courses described above being subject to correction and adjustment for deviation and variation in the marks of the compass during the intervening years,
(the said right of way being on the easterly side of the real property now owned by the plaintiff), and

Beginning for the same at a point on the West side of the main alley in the grounds formerly occupied by the Union Stock Yard Company as a stock yard, as shown in a plat attached to a lease recorded in Liber 1470 at folio 249 et seq. of the Land Records of the District of Columbia, distant North $43\frac{1}{4}$ degrees East 25 feet from the corner formed by the face of the wall on the South side of the branch and the fence on the West side of said main alley (said corner being the point of beginning for the demise and conveyance described in said lease and a deed recorded in Liber 1946 at folio 283 of said Land Records); thence running with the

west line of said main alley North $43\frac{1}{4}$ degrees East 30 feet; thence westerly parallel to the face of a wall on the South side of the branch, (the same being the northerly line of the conveyance recorded in Liber 1946 at folio 283 aforesaid) to the easterly line of a paved road at a point 25 feet distant from the easterly line of the right of way of the Baltimore & Ohio Railroad (said paved road being designated as a "driveway" on the plat attached to the lease recorded in Liber 1470 at folio 249 of said Land Records aforesaid); thence southerly with the easterly line of said paved road, (shown as a "driveway" on the plat recorded in Liber 1470 at folio 249 aforesaid), distant 25 feet from the easterly line of the right of way of the Baltimore & Ohio Railroad, to the northerly line of the parcel of land described in the deed to Joseph Cogito recorded in Liber 7833 at folio 158 of said Land Records; thence easterly along and with the northerly lines of the parcel described in the deed recorded in Liber 7833 at folio 158 of said Land Records aforesaid to the place of beginning, the courses described above being subject to correction and adjustment for deviation and variation in the marks of the compass during the intervening years,

(the said right of way being on the northerly side of the property now owned by the Plaintiff), are easements of and appurtenant to the real property owned by the plaintiff for general purposes of passage for ingress and egress to the plaintiff's real property and the real property abutting and adjacent to such rights of way.

3. The rights of way described in the paragraph next preceding shall be kept open for general purposes of passage for ingress and egress to the real property abutting upon and adjacent thereto, and the parties to this
 466 cause, their agents, servants and employees, and those claiming by, through or under them, be, and hereby are, enjoined and required to maintain the status quo existing between the parties to this cause prior to February 4, 1949, with respect thereto.

4. The plaintiff have and recover his costs from the defendants.

T. ALAN GOLDSBOROUGH
Judge

Seen:

BRANDENBURG & BRANDENBURG
By: A. LECKIE COX
Attorneys for Defendants.

• • • • •
EXCERPTS FROM TESTIMONY AND PROCEEDINGS

1 Washington, D. C.,
April 9, 1951.

The above-entitled action came on for trial on the merits before the HON. T. ALAN GOLDSBOROUGH, United States District Judge, at 3:00 o'clock p.m.

APPEARANCES:

On behalf of the Plaintiff:
H. WINSHIP WHEATLEY, Esq., and
H. WINSHIP WHEATLEY, JR., Esq.

On behalf of the Defendants:
LOUIS M. DENIT, Esq.,
IRVING B. YOCHELSON, Esq., and
THOMAS JACKSON, Esq.

• • • • •
5 **PROCEEDINGS**
• • • • •

Mr. Wheatley, Jr.: If the Court please, in this case the plaintiff seeks to enjoin an obstruction to an easement right-of-way which was erected by the defendant over a property which we maintain is an easement pertinent to the property owned by the plaintiff.

• • • • •
Exhibit B which is attached to the complaint is a right graphic illustration of the problem which we have before us.
• • • • •

Your Honor will notice that the plot plan which you have before you illustrates the property which was known locally as the stockyard and abattoir property. It is on Benning Road and is just easterly of the railroad tracks, the Baltimore & Ohio branch of the railroad tracks, and just west of what is now Minnesota Avenue and was at that time called Anacostia Road.

The plaintiff is the owner of a tract which is now known as Parcel 168/50,

* * * * *

6 The whole area was originally owned by the Union Stockyard Company in 1890 and by various mesne conveyances, it has now been passed where the area in dispute is owned by the plaintiff and the property adjoining is owned by the defendants.

* * * * *

7 Now, the dispute is about this alleyway.

* * * * *

and an alleyway that runs auxiliary to it along that line into a right-of-way which is marked as a driveway.

* * * * *

the property adjoining is owned by the defendants and was acquired through the common source of title of the Union Stockyard Company through mesne conveyance

* * * * *

During the intervening years between 1890 and the present time, or the time of the acquisition of this property by the plaintiff, the property that is now owned by him was operated as the Washington Abattoir.

* * * * *

Originally, there was a lease from the Union Stockyard Company to the Washington Abattoir and in that
8 lease, they covered an area of approximately 230 feet on one side, * * *

* * * * *

Some year or so later, they surrendered that lease and gave a deed from the stockyard to the Washington Abattoir Company which went further than the original demise, in that it made the long line 283 feet instead of 230 feet and it ran directly across from the line that is shown on the plat plan as an alley to the railroad tracks and back up to the beginning point. At that time, the alley was shown in a plat that had been recorded in the land records with the lease.

* * * * *

That was in 1890, and then in 1894 the deed went on record. With the lease, there was recorded the plat or the plan of the property which included the description of the alley as a boundary marker for the lines of the lease as well as a boundary marker for the lines of the deed which later followed. The alley was named as the boundary marker.

* * * * *

In the subsequent deeds that passed on with respect
9 to both parcels, the parcels owned by the plaintiff as well as the defendants, the alley has been mentioned. In a subsequent deed to Keane and Auth in trust for the Keane Company, Auth Provision Company and Loeffler Provision Company, the Union Stockyards conveyed an additional part which was southeasterly of the part that had previously been conveyed to the abattoir and was a parcel 50 feet along the alley and in that deed they used the alley as a boundary marker and have a provision therein that it shall not include any use of the alley south of the north line of that ground. We, of course, contend that by implication that means that the exclusion of the south part of it conveys with the deed the use of that which was northerly of it.

In the deeds that have followed throughout these years from 1890 until the present time, these words of the fence line of the alley and along the alley have been used consistently in the boundary lines of the alley.

* * * * *

10 This alley is what we contend an easement appurtenant to the real estate, the driveway gave access to the northwesterly corner of the property. The abattoir facilities were extended so that access could not be obtained into or from the center portion of the abattoir properties, without going into the main alley and that main alley was used conjunctively by the Union Stockyard for their hog pens, their cattle pens, and by the abattoir facilities, the Auth Company and the Loeffler Company, throughout the years.

• • • • •
Up until the present time

• • • • •
from the time of this first lease up until the present time.

• • • • •
Their defense is we abandoned it for more than twenty years prior to the filing of this suit.

• • • • •
the testimony will show that the only time that there was a failure to use it to its maximum use, was after a fire which occurred in 1934, until the time that the property was
11 eventually sold to the plaintiffs in a bankruptcy case, and during that period of time the abattoir wasn't used because of disputes between the owners of the abattoir property and the District Government and the Congress as to whether or not they could use that type of a place of business. But while it wasn't used to its maximum extent, it was used over that period of time and we will have testimony to show that it was.

The Court: What is the plaintiff's contention as to when the full resumption of its use began after 1934?

Mr. Wheatley, Jr.: In 1943, at the time of the acquisition by the plaintiff, in 1942.

The Court: And using it ever since?

Mr. Wheatley, Jr.: Yes, Your Honor.

The Court: When was this obstruction put in by the defendants?

Mr. Wheatley, Jr.: February 9 of 1949, if I recall the date, and at the time the plaintiff acquired the property, until that time it was consistently used by the plaintiff and those working for and coming to the places of business of the plaintiff, and when the obstruction was placed it prevented access to the plaintiff's property, the erection of barricades and sign posts which did not allow the access to his property and after complaint was made, the suit was

12 filed and then by stipulation filed in this case, the obstruction has been taken down pending the termination of this suit. But up until the time the suit was filed—there hadn't been any obstruction between the acquisition by the plaintiff and February of 1949, then when the suit was filed, there was about a period of two weeks when the obstruction remained, during which the application was made for an injunction and my friends agreed by stipulation to withdraw the obstruction without prejudice to the rights of either one of us.

• • • • •
We maintain that the only period of time in which this adverse use or the use of the property wasn't complete, was during the period of time when there was a dispute between the municipal and Federal authorities and even though there was that dispute, that the alley, both the main and the auxiliary alleys, were used by those who had business at that plant and were used adversely to the interests of the owners of the fee, and that it did continue until it was sold to the plaintiff and that since he has acquired it, he first made known his ownership and contention to the easement to the defendants at or about the time he acquired the property; that there came a time during 1945 when the defendants undertook to disrupt the use of the easement and the plaintiff made the complaint again to defendants and the attempts to disrupt the

13 easement were abandoned, and then there were no further attempts to break his use of that easement until the time when the obstruction barricade was actually put up.

Now, we want to show further to the Court that the manner in which these various parcels of ground have been acquired and the uses to which they have been put over the period of time, creates an easement appurtenant to the plaintiff's property by one of three reasons, or maybe all of three reasons:

One, by a specific grant contained in these deeds;

Two, by the implied grant, the fact that the deeds make reference to the alleys as boundaries and the alleys were there as boundaries—

* * * * * * * * * *

and the other one, an easement by necessity, that the only access to these properties was through the alleys which were then in existence and, of course, the other one will be by prescription, the adverse use.

My friends have stated in their defense that it has been abandoned for more than twenty years and we, of course, respectfully hope to show to Your Honor that that is not the fact, that we have used it consistently and it has been used consistently over this period of time and that the only reason for its non-use to its full use was that there was a dispute, but that there was no abandonment of the right to use it.

That is, in main, what the litigation is about.

14 in addition to the main alley which runs for the full length of the property of the plaintiff from the rear section up to Benning Road—there is a cross-alley which we have called an auxiliary alley.

* * * * * * * * *

it provides the only means of access to the buildings which face on it. There is no other access to the rear of those buildings which would allow the use of the first floor, except through that alley.

The Court: Let me ask you this: Of course, assuming that the plaintiff had not used the alley for more than 20 years, that wouldn't convey title to the defendant, unless the defendant claims that he has title to the alley in the absence of an easement in favor of the plaintiff; is that what they claim?

Mr. Wheatley, Jr.: They claim they have a fee title and we claim we have an easement over that fee title.

The Court: I see, all right.

Mr. Wheatley, Jr.: Now, in connection with the use of the alley, I would like to call Your Honor's attention to the fact that this area that we claim is the main alley is paved, it is paved with cobblestone or slag stone, the surveyor will testify as to that, and at the time of the acquisition by the defendants and by the plaintiff, that alleyway was paved from the rear part of the plaintiff's property all the way to Benning Road, a well-defined, paved roadway.

There is on that alleyway, adjacent to the first building of the plaintiff, a culvert over the stream, over the bed of the creek, and that is a well-defined and actually used culvert.

The Court: Is there any way it can be established who paved that alley originally? Did the plaintiff's predecessor in title or defendants' predecessor in title, or somebody else, pave the alley?

Mr. Wheatley, Jr.: One of the predecessors of either plaintiff or defendants. It has been there so many years no one can tell when it was put there. It is shown in 1891 and 1894 surveys, all this area is shown in the surveys of the Coast & Geodetic office, which we will produce.

After the plaintiff and defendants had each acquired this property in, I think it was 1945, Mr. Kogod undertook to grade and to shovel away part of the adjoining property and when the shovels came up to the area of this easement, this alleyway, the plaintiff protested to him that this was an easement, that he had the right to use it, and that if any

action was to be taken with respect to making him cease using it, he was going to resort to his rights at law and with that, the defendants' steam shovel or shovels stopped digging at the edge of the alley.

16 Now, the cobblestones that were in this alley are still there,

* * * * *

17 Now, with respect to the buildings which face the auxiliary alley, there is no access for ingress or egress to the first floor of those buildings without the use of this auxiliary alley. The auxiliary alley is a feeder into the main alley on one side and the right-of-way on the other side.

With respect to the buildings in the rear of those front buildings, the main access for ingress and egress for vehicles, trucks, workmen, people having business to deal with them, comes entirely, in the main, over this main alley; and we contend that we have either the implied grant, actual grant, or the easement of necessity.

* * * * *

19 Mr. Denit: The situation, if the Court please, I think is stated with substantial accuracy in the pre-trial order. We deny that the plaintiff has either an easement by grant or an easement by prescription, or an easement by implication or a quasi-easement.

* * * * *

21 Mr. Denit: Now, with respect to this so-called main alley over which the plaintiff is asserting easement, it is our position: First, there are no deeds or other instruments of title purporting to convey a right-of-way over that area.

* * * * *

22 The Union Stockyards Company opened gates over this alleyway, nothing but a passageway as a matter of fact, in the morning at a given hour, nobody to come into

that way prior to that hour. The gates were closed at a given hour in the evening.

The Court: Who closed them?

Mr. Denit: Union Stockyards Company, and anybody who used that way—

The Court: Is it your statement, sir, that both the abattoir and the Union Stockyards were at one time, while they were owned by different corporations, controlled by the same interests, is that what you say?

Mr. Denit: No, sir, I don't think we would go that far because the same interest did not, in fact, control the abattoir.

The Court: I see, all right.

* * * * *

23 Now, in 1928 or 1929, the evidence will show exactly when, operation of the abattoir ceased. It was never resumed.

* * * * *

At that time, the property was owned by Adolf Gobel, Inc. They undertook to rebuild but never got beyond the foundation stage of the new building. A controversy arose between them and Government authorities as a result of which they were denied a license to resume and they never thereafter reopened the abattoir.

* * * * *

About three years prior to that time, Union Stockyards Company sold all of the rest of the area to Mr. Kogod.

At the time Mr. Kogod took possession, there were fragments, substantial fragments of old gates that had been used to control the use of the passageway to the stock pens. Witnesses will indicate that to Your Honor, although I suppose you may be in some measure familiar with how they are operated: Pigs are controlled by the use of certain gates, cattle by the use of certain gates, sheep
 24 by the use of certain gates, to put in the pens.

* * * * *

All of that, however, ceased for practical purposes more than twenty years, we say, before the filing of this suit.

Now, after Mr. Cogito acquired title to the property, our evidence on our side of the case will, I think, tend to establish and I believe convince, Mr. Cogito never claimed any right to this way.

* * * * *

25 So, it is our position, not only does he not have any title as a matter of record, as against the record title in the defendant, not only does he not have any easement by implication or quasi-easement, but if he did have, it was long since abandoned by his predecessors in title;

* * * * *

The Court: Does the defendant claim that this alley is within the limits of the property conveyed to the defendant from his predecessor in title?

Mr. Denit: Yes, sir,

* * * * *

Now, getting back to the auxiliary alley, I am not clear from my friend's statement, whether the plaintiff is claiming some right in an auxiliary alley;

* * * * *

26 I would like to know now what the plaintiff's claim is with respect to the auxiliary alley.

Mr. Wheatley, Jr.: We claim that we have an easement over the auxiliary alley,

* * * * *

The obstruction was placed over the main alley, so that the suit was filed for the injunction against the obstruction over the main alley but we do claim an easement in the auxiliary alley.

* * * * *

27 there has never been any bar to us using the auxiliary alley and if my friend thinks we are waiving

any rights to it, I would say it is in issue because we maintain we have a right over that auxiliary alley,

• • • • •

28 Mr. Wheatley, Jr.: Your Honor please, I expect to call the plaintiff as the first witness, but before I do, may we get the formalities dispensed with by offering some of the exhibits that we have agreed on in the pretrial and some of those that we may have to take up.

First, I would like to offer the stipulation of counsel in the pretrial that the area in question was blocked by the defendants, the defendants admit the erection of the barricade for the purpose of preventing use by anyone other than the defendants or their permittees.

And next, the stipulation of the parties that the plaintiff's chain of title is derived through mesne conveyances of property described in paragraphs 4, 5, and 14. The defendants deny the easement or right-of-way, express or implied.

The next stipulation is that the defendants' chain of title has been derived through mesne conveyances to the
29 defendants as property described in paragraphs 6, 15, 16 and 17 of the complaint.

The next stipulation is that the common source of title of the plaintiff and the defendants was the Union Stockyard Company which was vested with fee simple title to the land now owned by both plaintiff and defendants on February 26, 1890. The plaintiff and defendants, respectively, own the properties described in the complaint through chains of title, derived by mesne conveyances, from such common source of title.

The next stipulation is it is admitted the area claimed as an easement by the plaintiff is correctly described in paragraph 18 of the complaint as the main alley and auxiliary alley, although the defendants deny an easement or right-of-way, express or implied, therein.

The next stipulation is that the Benning Viaduct was completed in 1919.

30 Those are the stipulations of the parties as embraced within the pretrial order. We offer in evidence, if the Court please, the deed from the Union Stockyard Company, deed to the Union Stockyard Company from Alvin M. Bastible and wife to the Union Stockyard Company dated the 14th day of October, 1887, and recorded on the 15th day of November, 1887, as set forth in the land records of the District of Columbia in Liber No. 1280, at folio 452. We like to ask that that be marked as an exhibit in this case, this is the deed by which the common source of title acquired title to both parcels.

(Deed to Union Stockyard Company dated October 14, 1887, was marked Plaintiff's Exhibit No. 1 for identification and received in evidence.)

Mr. Wheatley, Jr.: We offer in evidence a deed to the plaintiff which has been recorded in Liber 7833 at folio 158 in the land records of the District of Columbia, it is dated February 4, 1943 and was recorded on February 11, 1943.

(Deed to plaintiff dated February 4, 1943, was marked Plaintiff's Exhibit No. 2 for identification and was received in evidence.)

Mr. Wheatley, Jr.: Your Honor please, that deed, in brief, without reading all of the deed at this time, I might call the Court's attention to the pertinent part of the deed, if I may, it is a deed from the trustee in bankruptcy of

31 Adolf Gobel, Inc., who was appointed trustee in bankruptcy by the United States District Court in the District of New York and conveys to the plaintiff the property described in the suit as Parcel 168/50. It includes the right-of-way which we have called a driveway in the original plat, along the northwesterly section of this ground and it also includes all rights of the trustee in bankruptcy and of the debtor corporation in and to the land adjoining on the northeast or south of the granted part, which includes in our interpretation the easement appurtenant over which we claim the easement on the defendants' property and also all privileges and appurtenances thereto belonging.

I would like to offer as an exhibit the plot plan which is Exhibit B to the complaint.

The Court: Please mark this, Mr. Clerk.

Mr. Denit: We agree that that would be limited to orientation only, in other words, it is not a survey, not an official document in any sense of the word and might be used only for purposes of diagrammatic explanation, something of that sort. The lines there don't purport to be accurate lines or surveyor's lines.

The Court: All right.

Mr. Wheatley, Jr.: We will probably follow that up with proof of plain from the Building Inspector's office at a later time, but for the present time it will be for orientation.

32 The Court: All right, sir.

(Plot was marked Plaintiff's Exhibit No. 3 for identification and received in evidence.)

Mr. Wheatley, Jr.: We offer in evidence the lease between Union Stockyard Company and Washington Abattoir Company, dated February 26, 1890, and recorded on March 18, 1890, and recorded in the land records of the District of Columbia in Liber No. 1470, at folio 249.

(Lease from Union Stockyard Company to Washington Abattoir Company, dated February 26, 1890, was marked Plaintiff's Exhibit No. 4 for identification and received in evidence.)

Mr. Wheatley, Jr.: Exhibit 4, Your Honor please, the lease just referred to, includes the northerly portion though not the extreme northerly portion, the major portion of the property now owned by the plaintiff and the particular reference to that lease is to include the plat which was recorded with the lease and which is shown in the land records, showing the alley, and Your Honor might look at that plat which shows the alley alongside of all the area which the plaintiff now claims he is the owner of.

I might say to Your Honor that the Exhibit A which is attached to the complaint is a free-hand drawing of the

plat attached to the lease and the only purpose for using Exhibit A instead of the lease plat is that the figures
 33 on my Exhibit A are larger, which I can read easier than the figures shown in the photostat of the plat.

We offer in evidence the deed from the Union Stockyard Company in New Jersey to the Washington Abattoir Company of West Virginia, dated the 20th day of September, 1894 and recorded on the 22nd day of September, 1894, in Liber 1946 at folio 283 of the land records of the District of Columbia.

(Deed from Union Stockyard Company to Washington Abattoir Company dated September 20, 1894, was marked Plaintiff's Exhibit No. 5 for identification and received in evidence.)

Mr. Wheatley, Jr.: The deed last mentioned, if Your Honor please, covers the same property which was included in the lease mentioned just before, except that it adds to it 53 more feet southerly of that and it also contains a description of a property as bounded by the alley which is referred to in the deed and it contains also the covenant with the easement rights-of-way and appurtenances thereto adjoining and also the driveway which is mention as the right-of-way and it contains also in the addendum clause the usual provisions as to appurtenances.

We offer a deed from Union Stockyard Company to Michael A. Keane and Nicholas Auth dated the 24th day of May and recorded on the 29th day of May, 1906, at Liber 3018, folio 103.

34 (Deed from Union Stockyard Company to Keane and Auth, dated May 24, 1906, was marked Plaintiff's Exhibit No. 6 for identification and received in evidence.)

Mr. Wheatley, Jr.: The deed just referred to, Your Honor, which has been marked as No. 6, is a deed to Messrs. Keane and Auth and conveys the south part of the plaintiff's property beginning at the line just below that which was granted by the previous deed. It is an area of 50 feet

in width and it extends 152 feet to the railroad lines and it is bounded, according to the deed, the eastern line is on the west line of the alley with a right-of-way, but does not include the use of an alley south of the north line of the first line of the deed, and we submit that that is by implication a grant of the use of the alley north of that line but not southerly of it.

* * * * *

We offer the deed from the Washington Abattoir Company to Andrew Loeffler, and others, dated the 31st day of December, 1904 and recorded the 3rd day of January, 1905, set forth in Liber No. 2893 at folio 177.

(Deed from Washington Abattoir Company to Andrew Loeffler, et al., dated December 31, 1904, was marked Plaintiff's Exhibit No. 7 for identification and received in evidence.)

Mr. Wheatley, Jr.: Exhibit No. 7 * * * which was just introduced, includes the property just north or northerly of the property conveyed to Keane and Auth which was just referred to, and that deed also has as a boundary the line on the alley and it includes the rights-of-way and appurtenances which are in connection with that property.

Mr. Denit: May I ask you what you mean by that? I don't follow it clearly. What rights-of-way do you claim are appurtenant to —

Mr. Wheatley, Jr.: We claim the alley in suit is appurtenant to this property.

Mr. Denit: You mean that deed you just offered refers to such rights-of-way?

Mr. Wheatley, Jr.: It refers to the alley which bounds it and thereby we contend that that is an easement to this property, yes.

We offer, if the Court please, a mortgage made by the Union Stockyard Company to the American Security & Trust Company dated January 1, 1910 and recorded Janu-

ary 4, 1910, and set forth at large in Liber 3271 at
36 folio 475.

(Mortgage from Union Stockyard Company to American Security & Trust Company, dated January 1, 1910, was marked Plaintiff's Exhibit No. 8 for identification and received in evidence.)

* * * * *

Mr. Wheatley, Jr.: We also offer, if the Court please, the deed from Loeffler, et al, to the Washington Abattoir Company dated May 22, 1916, recorded May 25, 1916, in Liber 3869 at folio 275 of the land records of the District of Columbia.

(Deed from Loeffler, et al, to Washington Abattoir Company, dated May 22, 1916, was marked Plaintiff's Exhibit No. 9 for identification and received in evidence.)

* * * that deed conveys two parcels which have been included in the deeds mentioned before, the northerly portion as well as the southerly portion, and also mentions the boundary on the alley and conveys the rights and easements and appurtenances, whichever they may be.

* * * * *

We offer deed between the Union Stockyard Company and the A. Loeffler Provision Company, dated June 22, 1928, recorded June 23, 1928, and recorded in Liber No. 6172 at folio 35 of the land records of the District of Columbia.

(Deed from Union Stockyard Company to A. Loeffler Provision Company dated June 22, 1928, was marked Plaintiff's Exhibit No. 10 for identification and received in evidence.)

37 Your Honor please, this Exhibit No. 10 includes the northernmost part of the plaintiff's property. It is an irregular shaped area, it is immediately north of the property which is shown in the first lease, and that also uses the alley for the marker.

The Court: Is that the property adjoining this other alley?

Mr. Wheatley, Jr.: The auxiliary alley, yes, Your Honor, right on the corner of the auxiliary alley; it is an irregular shape and Your Honor can see from the plat plan there the irregular shape of that lot. It is the first building there.

* * * * *

Mr. Wheatley, Jr.: We also offer in evidence deed from the A. Loeffler Provision Company to Keane-Loeffler, Inc., dated July 6, 1928, recorded July 6, 1928 and set forth at large in Liber No. 6177, folio 261 in the land records of the District of Columbia.

(Deed from A. Loeffler Provision Company to Keane-Loeffler, Inc., dated July 6, 1928, was marked Plaintiff's Exhibit No. 11 for identification and received in evidence.)

* * * * *

No. 11 which has just been introduced includes the same property that was mentioned in the deed just a minute ago, except one additional area just west of that shown as the additional irregular-shaped property on the auxiliary alley, and that deed also uses the main alley as a marker.

38 We offer in evidence, if the Court please, a photograph of the plat on record in the office of the Surveyor of the District of Columbia, which is dated October 31, 1906, and is shown on Plat 168 of the volumes in the Surveyor's office known as the A. and T. records, assessment and taxation records.

* * * * *

The exhibit is offered, * * * to illustrate the record of the Surveyor's office of the existence of the alley over Parcel 168/5 which is the antecedent designation of the present parcel of 168/50.

The Court: How does it reflect on the issues in this case?

Mr. Wheatley, Jr.: The fact of the existence of the alley.

The Court: That isn't particularly in the suit, is it?

Mr. Wheatley, Jr.: I believe, Your Honor, we maintain it is an alley and these gentlemen deny it is an alley.

* * * * *

39 168/6 and 168/5 are both now included in 168/50 which is owned by the plaintiff and this alley is shown as adjacent to and running alongside the property owned by the plaintiff.

The Court: If its location is identical with this alleged easement which is in dispute in this case, the Court thinks it is admissible as some evidence that there is an alley there which belongs to somebody.

* * * * * * * *

40 The Court: I have no idea what it means myself, sir, but if you two gentlemen can agree on whether or not it indicates this same property that is indicated by this alley, then I can rule on it; otherwise, I can't, because I don't know anything about that. I have no means of knowing.

Mr. Wheatley, Jr.: We respectfully submit to the Court that it is the alley that is adjacent to the plaintiff's property and it so shows on the face.

The Court: Well, the Court will admit it subject to exception, if the Court finds later it has no relevancy in the case, it can be stricken out.

(Photostat of Plat 168 on record with Surveyor, D. C., dated October 31, 1906, was marked Plaintiff's Exhibit No. 12 for identification and received in evidence.)

The Court: The Court is very much interested in this statement by plaintiff's counsel that this alley was paved and has been paved; now, somebody paved it. If there is any testimony that can be introduced as to how it was paved and who paved it, I think it would throw some light on the issues in the case.

Mr. Wheatley, Jr.: * * * We can show from these
41 witnesses back as far as 1907 that it has been paved that long.

The Court: But you don't know who paved it?

Mr. Wheatley, Jr., I don't know who paved it, sir.

* * * * * * * *

Mr. Wheatley, Jr.: We offer in evidence, if Your Honor please, a survey made in the office of the Surveyor of the District of Columbia, dated January 14, 1943, of the property owned by the plaintiff and the data adjacent thereto with respect to the alley, with respect to the paved roadway adjacent thereto.

* * * * *

42 (Plat of survey by D. C. Surveyor dated January 14, 1943, was marked Plaintiff's Exhibit No. 13 for identification and received in evidence.)

Mr. Wheatley, Jr.:

* * * * *

that survey shows the data assembled by the District of Columbia Surveyor, showing the condition of the area alongside the plaintiff's property with respect to the paved condition of the roadway.

Your Honor please, we offer in evidence records of the Coast & Geodetic Survey for the survey published in 1895 with respect to the property in dispute and the survey data prepared between the years 1887 and 1891 from which that published survey sheet was made.

* * * * *

Mr Denit:

* * * * *

we do not require a witness to come here and prove that they are official records from the Coast & Geodetic Survey.

Mr. Wheatley, Jr.: We offer them in evidence to show the records of the Coast & Geodetic Survey showing the area in question and the markings of the alley thereon.

* * * * *

43 It is a public record,

* * * * *

of the topographical area of the District of Columbia at that time. It shows thereon the buildings, the areas, the

roadways, the creeks and markings of a topographical nature as of that period of time.

The Court: Well, the Court is going to admit it subject to exception, that is so the Court can consider it and decide later as to whether or not it is relevant for any purpose in the case.

Mr. Wheatley, Jr.: Mark one 14 and one 14-A.

(Record of Coast & Geodetic survey, 1887-1891, were marked Plaintiff's Exhibit No. 14 and Plaintiff's Exhibit 14-A for identification and received in evidence.)

Mr. Wheatley, Jr.: Your Honor please, we offer in evidence a photograph of the area of Benning Road
44 adjacent to the Benning Viaduct, taken July 6, 1939, which shows the entranceway of the alleged alley from Benning Road, which picture is produced from the office of the Corporation Counsel of the District of Columbia.

The Court: An alley ordinarily, sir, would purport not a right-of-way to any individual but a general right-of-way. Is that what you are claiming, there was a general right-of-way?

Mr. Wheatley, Jr.: This was a general right-of-way for all the places along that line, yes, Your Honor. There were three or four other places there, too, our place was one of them and we now have the whole thing, but it was then separately owned.

The Court: I see. Of course, if it could be established that this was an alley, ever an alley in the usual conventional sense, and paved as such, it would help the Court mightily in deciding this case. Of course, what I am now about to say is merely for the suggestion of both sides to think about: If it ever was an alley in the conventional sense, the use of it wouldn't be lost by twenty years or any other length of time, as far as I know.

Mr. Wheatley, Jr.: That is right, Your Honor please, it has never been dedicated to public use by dedication, I mean no actual dedication of it. It has been used ever since this

1890 period by everyone in that area for passage to
 45 and from the various business houses along there,
 and thereby we contend that it has become a public
 use and particularly a public use for the property owned
 by the plaintiff. Now, the cobblestone that is in there, we
 will have witnesses testify to the fact that the same exists,
 but I have no testimony as to when it was first put down.

* * * * *

(Photograph of the Benning Road area, dated July 6,
 1939, was marked Plaintiff's Exhibit No. 15 for identifica-
 tion and received in evidence.)

Mr. Wheatley, Jr.: The photograph, Your Honor please,
 has been marked Exhibit No. 15. The picture is looking
 easterly, Your Honor please, you are looking toward the
 Maryland side of the Benning Viaduct bridge.

46 The Court: It is looking at the descent toward
 Minnesota Avenue and Anacostia Avenue?

Mr. Wheatley, Jr.: Yes, Your Honor.

We offer in evidence the design of the Engineer Commis-
 sion, Division of Bridges, District of Columbia, for the
 Benning Viaduct which was made on March 4, 1920, which
 is identified as 203/26, which shows the topographical lines
 including the indication of a road to the stockyards on the
 southerly side of Benning Road.

* * * * *

It is on your right going from Washington, sir.

The Court: On the right, I see; and this alley immedi-
 ately adjoins the viaduct, is that right?

Mr. Wheatley, Jr.: Yes, Your Honor, the alley coming
 right into the road that adjoins the viaduct, the road below
 the viaduct.

* * * * *

Mr. Denit: It is the first time we have seen it, we object
 to its admission in evidence, certainly without the right to
 cross-examine * * * .

* * * * *

47 Mr. Wheatley, Jr.: Your Honor please, this is a design section made by the Division of Bridges of the District of Columbia in connection with the enlargement of the Benning Viaduct and it is the ground level area of the roadways, and things of that type in connection with the viaduct. It was made on March 4, 1920, and shows the location of the west side of the road to the stockyards from the Benning Road adjacent to the Benning Viaduct. It was made by Mr. H. R. Howser, whom we have under summons if necessary, but if we could have the plan go in we offer it in evidence, it would simplify it.

* * * * *

48 it wasn't made in connection with location of this road, it is a public record in the Engineer's Office of what the location of roads are in connection with the Benning Viaduct which is adjacent to this property.

The Court: Now, the photograph here, is this supposed to show this alley?

Mr. Wheatley, Jr.: The alley, yes, Your Honor. Your Honor please, the alley enters right here, comes in from Benning Road, goes right down there.

The Court: Is this it, right here?

Mr. Wheatley, Jr.: Yes, Your Honor. May we show to Your Honor what we maintain is the relevancy with respect to the plat kept by the Engineer's Office?

The Court: I will look at it, sir, if I can understand it.

Mr. Wheatley, Jr.: This is the road, Your Honor, we contend is the alley.

The Court: When was this made?

Mr. Wheatley, Jr.: 1920, sir.

The Court: Have you a living witness who can testify who made this?

Mr. Wheatley, Jr.: Yes, Your Honor. We have the witness who prepared it in the Engineer's Division of the District of Columbia.

49 The Court: I think probably with his testimony it would be admissible, but I doubt if it is now, because it

isn't sufficiently identified. So I will hold ruling in abeyance until you can put him on the stand.

Deputy Court Clerk: Shall I mark it for identification?

The Court: Yes.

(Design of Benning Viaduct, Division of Bridges, dated March 4, 1920, was marked Plaintiff's Exhibit No. 16 for identification.)

Mr. Wheatley, Jr.: Your Honor please, we have discovered an additional plan of this area since the pretrial which is probably more nearly accurate than the plot plan which Your Honor has before you, because it is the fire insurance underwriter's plan of the area. We would like to introduce this in evidence and so offer it.

Mr. Denit: Is there somebody you are going to call with respect to this?

Mr. Wheatley, Jr.: I think all the witnesses will be interrogated with respect to this particular plot plan and we would like to have it in evidence to be available for interrogation of the various witnesses. It came from the Fire Underwriter's Association in the Woodward Building, it is an official plat of their office. We had it photographed for convenience.

50 Mr. Denit: That is no more official than if it were in counsel's office. We object to it.

• • • • •

The Court: Well, the Court thinks you may have a witness, sir, who knows something about this issue and who professes recollection from that paper, but I don't think you can use it for any other purpose.

Mr. Wheatley, Jr.: Yes, Your Honor, it would be valuable for purposes of illustration of what witnesses have to say and refreshing their recollection. We do offer it for that purpose, if we may.

The Court: Well, it can be offered at the time you offer your witness.

51 Mr. Wheatley, Jr.: May we have it marked for identification for us?

The Court: Yes, sir.

(Fire Underwriter's plan was marked Plaintiff's Exhibit No. 17 for identification.)

Mr. Wheatley, Jr.: We offer in evidence the photographs which were identified at the pretrial examination, photographs taken under date of October 20, 1942.

Deputy Court Clerk: Are these photographs of the alley?

Mr. Wheatley, Jr.: Of the alley.

Deputy Court Clerk: 18-A and 18-B.

(Photographs of the alley, dated October 20, 1942, were marked Plaintiff's Exhibit No. 18-A and Plaintiff's Exhibit No. 18-B for identification and received in evidence.)

Mr. Wheatley, Jr.: Your Honor please, those photographs, which have been marked as Exhibits 18-A and B, are two photographs taken as to the condition of the alley in 1942 at the time of the acquisition of the property by the plaintiff in this case and the surrounding area.

* * * * *

Mr. Wheatley, Jr.: * * *

We offer in evidence, Your Honor please, a number of other photographs which have been taken since the pretrial on which counsel has not yet had an opportunity to examine. They were taken within the last week. They show the condition of the property at the present time and
52 will be followed by testimony by witnesses as to the condition. We offer them in evidence.

* * * * *

(Photographs of the area showing present condition, were marked Plaintiff's Exhibits No. 19-A through 19-J for identification and received in evidence.)

Mr. Wheatley, Jr.: Your Honor please, defendants acquired title which they own by deed from Union Stockyard Company to the Eastern Development Corporation, dated June 27, 1941, recorded on July 9, 1941, and recorded in Liber 7637 at folio 43 of the land records, and a conveyance from the Eastern Development Corporation to Fred S. Kogod and Celia Kogod, his wife, as tenants by the entirety, the defendants in here, May 14, 1942, recorded on

May 20, 1942, set forth at large in Liber 7754 at folio 571, and the property which they acquired is described in paragraph number 17 of the complaint.

Your Honor please, I believe those are all the preliminary introductions of evidence we have at this time.

• • • • •
53 Washington, D. C.,
April 10, 1951.

• • • • •
55 The Court: Gentlemen, * * * I would like to look at the ground. Is there any objection, is there any reason why I should not go? Does it suit you all to go at 4:00 o'clock?

Mr. Yochelson: No objection.

Mr. Wheatley, Jr.: Yes, sir.

The Court: I can get a better picture that way.

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Joseph Cogito, the plaintiff, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wheatley, Jr.:

• • • • •
56 Q. How long have you lived in the District of Columbia? A. Since 1934.

Q. Are you a naturalized citizen of the United States? A. Yes, sir.

Q. And when and where were you naturalized? A. Naturalized in Cleveland, Ohio, June 25, 1925.

Q. Have you lived in the United States ever since that time? A. Yes, sir.

Q. What is your business? A. General contractor.

Q. Do you own a place of business in the District of Columbia in the vicinity of Benning Road, Northeast? A. I do.

Q. Tell the Court where that is. A. Well, it is west of now Minnesota Avenue and south of Benning Road.

Q. And with respect to the railroad track? A. It is alongside the B. & O. Railroad.

Q. And what is the parcel designation in the District of Columbia assessment records? A. Originally it was Parcel 168/5, 168/6, 168/19. In 1932, it became one parcel and is designated as Parcel 168/50.

57 Q. Is that place all owned by you? A. Yes, sir.

Q. And was it acquired by you by one deed? A. Yes, sir.

Q. And when did you buy the property, Mr. Cogito? A. I bought it September 30, 1942.

Q. And from whom?

* * * * *

Q. From whom did you buy it? A. I bought it from the District Court of New York, the Court and Mr. Seligson and Mr. Nelson, the former president of Gobel, Inc., were the trustees.

Q. Mr. Cogito, I show you a paper which has been introduced in evidence as Plaintiff's Exhibit No. 2. Is that the deed by which you acquired title to the property in question? A. Yes, it is.

Q. Now, prior to the actual delivery of the deed to you, had you gone to the property? A. Yes, I did.

Q. Will you tell the Court what you found at the location of the property at your first inspection thereof, and when it was? A. Well, my first inspection was on July 10, about

that, 1942. I was invited to bid to this property, so

58 I inspected the premises on that date. I went over,

being my first time if I recall right, I went over the Benning Road bridge. There I made a sharp "U" right turn and I went alongside the bridge. Right at the corner of Minnesota Avenue and Benning Road, on my left was a parking lot dividing the Benning Road with the parking lot, and this parking lot for an approximate of about 150 feet deep west of Minnesota Avenue, there were a wooden

post about three foot high, with a half inch or three-quarter inch wire cable stringed through. So I stopped there and I analyzed this parking lot to the best of my judgment, it was about 150 feet deep, as I stated, by 300 foot long. So I proceeded a little farther down and I came at the end of the parking lot and there were a lot of growths, bushes, goldenrod and things of that kind.

I proceeded for about 100 feet and I came to a roadway. I stopped and I looked this roadway and I saw it let me through, straight through, alongside the building where I wanted to go.

Q. Alongside which side of the building? A. On the east side of the building. So I made a left turn at this intersection, which was paved, and I stopped there at the intersection and I looked to my right. There was a big pile of discarded asphalt, a lot of growth, on this pile, of weeds, also bushes and goldenrod, as I stated, and some poison ivy. I paid particular attention to the poison ivy
59 because I am subject to it.

So I looked on my left of the intersection and the same thing was there.

Q. When you say to your left, you are proceeding southerly, is that right? A. I was still standing still, then. Then, I begin to proceed southerly and down a grade a little and then I came to a fence line. This fence line was diagonally north—yes, northwest and southeast, kind of this way (indicating). So I stopped there and I seen that this fence was almost dropped down and I proceeded a little farther and I came over a bridge, a culvert, that is what it really is, a concrete culvert. I pass over the concrete culvert and on my left I saw a little peach tree and there was a fence post dividing the roadway from the property east of the roadway.

I went a little farther up and I saw a fire hydrant, still went a little farther up about another hundred feet and there on this roadway was a cut by an excavation that was prior done. So, I couldn't go no farther. I got off the car and I look on my right and I saw walls that were well

braced, walls standing high, about 60 feet long, about 15 foot high, and there were the props anchored in a part of the alley of the roadway. I saw these props were taking about, oh, one-third of the alley. As I stated, I got off of the car, I went down this excavation, and then I looked on my right side and it was a three-story building that
 60 the weather had undermined the corner footing and that was the northeast corner footing, and it was in very bad shape.

So, I proceed up-grade and I went to the alley. On the alley a little farther up was another hydrant on my left and I proceeded a little farther for about another 50 or 60 feet and there was an intersection of another alley. I turned to my right and I went as far as the first railroad siding, which siding was for the purpose of delivering coal in the boiler room. There I went into the premises and from there I went about 10 or 12 steps down and I went in the basement of the boiler room. I inspect this boiler room and I came up. When I came up, I turned to my left and I went to what was, in my opinion, a machine shop; it was a very large room, 50 by 50, and this was in good condition, so I went almost to the front and I turned to my right and there was a door that led me into the three-story building which I had to call my attention first that the corner was undermined.

I went into that room and that was used, in my opinion, as an air compressor room, the first floor, and then I walk up to the second floor and also to the third floor. Then I came down again and I went through the front door of this corner building. From there, I went down the grade about 15 feet where this large area of excavation was. The bottom of it was a lot of water on it, lot of weeds, so I just walked around there and I discover that the columns, the
 61 footing of the columns had been put in, and I think was about 8 or 9 sticks of reinforcing steel bars was sticking up. That is what called my attention to it.

So I examined all those footings and then I went to the front building. There was a basement door open into this

large excavation and I went through this, what appeared to me to be the refrigerator room. I noticed, well, that there were three large iceboxes in there with the doors, the walls and ceiling were lined with a cork, the doors were down. I paid particular attention to the hardware of the door and it seemed to me it was very expensive. I looked the three rooms and I went upstairs. There was and still is a little circle iron ladder that take from the first floor to the second to the third. So I went to the second floor and I examined the floor and the columns and then I went to the third floor and I examined the post. I examined the building in its entirety there.

When I arrived in front of the building, I noticed there was a door to my left and I went in there and that appeared to be Anth's, which had been on fire before. I saw a lot of scattered bills there, invoices, things of that kind, I didn't pay no attention to, so then I came down from the outside stairway which led me on front of what was prior to my visit, a store, a meat store.

So then I walk in front of this building, I turn to
 62 my left, going east and I went to the corner where I previously had stated and then I went back up and I went into my car.

Now, the fence, the posts there were having barbed wire on it, which was on the east side of the roadway. They had three strings on of barbed wire separating this road with the adjoining property. I inspected this fence and it had been broken in several different places. So I turned my car and back I went home.

The next time, I think, was the following—

Q. Just to interrupt you for a second, the roadway you said you went along was on the east side of your building?

A. That is right, sir.

Q. What type of construction was that road? A. It is a cobblestone, we call them granite blocks, really, in construction, but the ordinary term for it is cobblestone road or flagstone road.

Q. That was the time you were there in July 1942? A. 1942.

Q. All right, sir. Go right ahead, sir. A. And this road is still there, with the exception of that part which Mr. Kogod dug in 1943 and some of the curbstone, this road had a curbstone, and some of them are still there.

Q. All right, sir. Go right ahead. When was your next visit to the plant? A. My next visit was shortly thereafter, about three or four days. The property impressed
63 me very much, it could be salvaged. So, I begin to give a close inspection then to what to do on my second visit. And on my third visit, I done the same thing.

So then I decided to put a bid and on September 30, I went to New York and put in a bid and put up a deposit for the property. The Court accept the bid, but as the trustee had been notified to barricade, in other words to safeguard the children from the danger of this property, the District of Columbia Inspector had notified the trustee of Gobel to take immediate action on the protecting the property, protecting the public. Well, the trustee stated to me—

Mr. Denit: We object to that.

By Mr. Wheatley, Jr.:

Q. What did you do, not what he told you, what did you do? A. I went there right after that and barricade the premises. I put signs so the children wouldn't go in there, in other words I barricaded the entire property, preventing the public or the children, rather, from going in it.

Q. From going in the property? A. In the property, yes, sir.

The Court: Does that include this roadway?

The Witness: The roadway was left open, Your Honor. I just barricaded the sides of the building.

64 By Mr. Wheatley, Jr.:

Q. What further was done, Mr. Cogito? A. Well, on the, about the first part of October, I ordered two trailer loads of lumber, which was delivered on the premises. I think

it was on the second load, a gentleman approached me, was Mr. Kogod, I know him now, I did not know then.

Q. This gentleman who sits here now? A. That is right, that gentleman sitting there. Mr. Kogod come over there and says what I was doing.

Q. When did you say this was? A. The first part of October, 1942.

The Court: Had you bought the property at the time?

The Witness: Yes, I bought the property September 30, 1942, Your Honor. Mr. Kogod come over there and he asked me what I was doing. I told him that I was barricading the property to keep the children away from it, and he said why was I doing that? I stated to him that I had purchased the property and that in order to comply with my agreement, I had to take immediate steps to protect the property. He asked me how you going in and out of here? I says what you mean, how I am going in and out of here? Well, he says, "This is my property."

By Mr. Wheatley, Jr.:

Q. Where were you standing at that time? A. We were standing right in the center of the front building, 65 where I was beginning to work with the fence to close in the property. I asked him, I said, "What do you mean it is your property?" He said, "Well, you are standing right on my property."

The Court: Is that part of this roadway where you were standing?

The Witness: I was standing in the auxiliary alley, Your Honor. May I have the picture, I will show to His Honor.

The Court: I understand.

By Mr. Wheatley, Jr.:

Q. That was the northerly side of your property? A. The front building, that is right. Mr. Kogod said he owned the property and that he was surrounding me all around. He asked me how would I get in and out? So I called Mr. Kogod, I said, you please come over here, and

we went east from where we were standing to the building and I showed to him, I said, "You see this road beginning at Benning Road?" This is the alley that I am referring to now, "You see this road leads right alongside my building and I assume that this road was built purposely for this building."

Then I said, "Come over here," and we went to the west side of the building and I said, "You see this driveway here?" I told him, I said, "This driveway or this road leads into this property and belongs to this property."

Then we went back where we were standing and I
66 said, "You seen this large door here?" I said,

"When you bought your property and when I bought this property, this was a garage and machines and trucks was going in and out of here." Well, he still insisted that he owned the property and I said, "Mister, I do not claim anything of your property except the right to go over the premises," and he asked me what title company was searching the title. I told him there was the District Title Company. He then said that the same company—

Q. Now, without discussing what the Title Company has been doing or anything, what was the condition of the roads at that time when you and Mr. Kogod were speaking about them? A. In the same condition as it is today, with the exception of a little more wear and tear and perhaps a little mud on top of it.

Q. On top of the cobblestones? A. Yes.

Q. Did you point out to him the full length of the road which is called the alleyway on the east side of your property? A. That is right.

Q. What did he say about that? A. He said that was his property.

Q. And did you point out to him what we call the auxiliary alley in front of the northern part? A. We were standing then there, when the conversation began.

67 Q. Now, what happened after that, Mr. Cogito? A. With Mr. Kogod?

Q. Well, yes, with Mr. Kogod. A. Well, Mr. Kogod then introduces his name. He said, "Do you know who I am?" I said, "No, sir." He said, "I am Fred Kogod." I said, "Pleased to know you, Mr. Kogod," and he looks at me and I look at him and none of us said a word. And then I told to Mr. Kogod, I said, "Mr. Kogod," I said, "if you are right, you are right, I will not dispute you are right; but if you are wrong," I said, "I want you to know that I will fight the wrong with everything that I got," and I left him.

Q. Now, then, at that time was the road being used by you, were trucks coming to your place? A. Well, that was the beginning, naturally, yes.

Q. Tell us what that was. A. Well, at that particular day I was just unloading lumber to barricade the premises.

Q. As a matter of fact, was lumber being unloaded there?

A. Yes, indeed, the first trailer load had arrived in the morning and I was waiting for the second trailer load.

Q. What access road did those vehicles use to bring in that lumber? A. The first road, because that was the natural one to use because that was the first one to come to.

Q. When you say the first road, do you mean the
68 road alongside of the east side of your buildings?

A. That is right, sir, which extends to Benning Road.

Q. They came in from Benning Road to your property?
A. That is right.

Q. How far along that roadway did they go, did the trucks go? A. Just right in front of the building there, with the exception the second load was delivered right up side where the excavation begins that I mention a little prior, where the alley was cut by excavation.

Q. How many times after that was the roadway used, that roadway? A. Now, that is a hard question, Mr. Wheatley, how many times, I can't tell you.

Q. Well, what use was made of it that you know of, Mr. Cogito? A. Well, I was making the use for delivering material.

Q. Over what period of time? A. Right from the beginning.

Q. From then until now? A. Positively.

Q. What type of vehicles or people use that road? A. Well, trucks, cars, walking.

Q. And did you change or modify or reconstruct any of the buildings that were then on the premises? A. 69 Yes, indeed.

Q. Now, did you later have a further conversation with Mr. Kogod, Mr. Cogito? A. Well, then I had a conversation with Mr. Grossberg.

Q. Mr. Grossberg? A. Yes, sir.

Q. That is Mr. Kogod's attorney? A. Mr. Kogod's attorney.

Q. Now, you can't testify as to what you told him, but did you have any conversation with Mr. Kogod? A. No, I don't think so at that time.

Q. Sir? A. I don't think so any more at that time.

Q. Did you talk to Mr. Grossberg or write to him? A. I wrote to him.

Q. You wrote to Mr. Grossberg? A. That is right.

Q. Was he attorney for Mr. Kogod? A. For Mr. Kogod, yes, sir.

Q. Do you have your letter there? A. Yes, sir.

Mr. Wheatley, Jr.: We offer in evidence, Your Honor please, the letter from Mr. Cogito to Mr. Grossberg and the reply received from Mr. Grossberg, who was then counsel for Mr. Kogod. Is there any objection, Mr. Denit?

70 Mr. Denit: No.

(Letter dated October 24, 1942 to Mr. Grossberg from Mr. Cogito was marked Plaintiff's Exhibit No. 20 for identification and received in evidence.)

(Letter dated October 26, 1942 to Mr. Cogito from Mr. Grossberg was marked Plaintiff's Exhibit No. 21 and received in evidence.)

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By Mr. Wheatley, Jr.:

Q. Mr. Cogito, did you remodel the buildings? A. Yes, I did.

The Court: Did he what?

Mr. Wheatley, Jr.: Remodel the buildings.

By Mr. Wheatley, Jr.:

Q. The part that you said, I believe, in your testimony, was an excavation within the grounds you owned, what use was made of that in its present condition? A. That was the very first work I did, I begin to buy surplus dirt. You know what I mean by surplus dirt?

Q. Yes, I think we all understand what you mean by surplus dirt. What did you do with the surplus dirt? A. I went at the corner of Minnesota Avenue and Benning Road and all the trucks that were carrying surplus dirt, I stopped and I was willing to buy.

71 Q. Now, what happened? A. I first paid 50 cents for each load.

Q. Did trucks, as a result of something, come in your place? A. Yes, soon as the word spread out among the truck drivers that I was buying dirt, I had a fleet of trucks come in there all the time, I mean during working hours, naturally.

Q. Came in where? A. To the plant, to my place.

Q. What access facilities did they use to come into the plant? A. We used both access, we used the roadway alongside of the building and also the first driveway, because I was in a hurry to fill—

Q. When you say the first drive, do you mean the roadway alongside the east side of your buildings? A. That is right, the first road.

Q. Mr. Cogito, so as not to cast any confusion here, would you call the road that runs alongside of your building the alleyway? A. I would be glad to.

Q. Now, how far does that extend alongside your buildings, all the way? A. All the way through, but we didn't go all the way through, though.

72 Q. How far did you go? A. Well, we remain up to this, where the first excavation was cut.

Q. Where is that? A. It is about, I would say, 200 feet south of the corner of the building.

The Court: Is it near the one called "Sausage factory" here?

The Witness: That is right, sir.

By Mr. Wheatley, Jr.:

Q. Now, what happened then, Mr. Cogito? A. Then, I fill it in and I begin to remodel the front building, the sausage factory; so, after I had it remodeled, I put it in good condition, I advertised to lease and I lease it to the—can I say to who I lease it?

Q. Yes. A. I lease to the Bureau of National Affairs, David Lawrence, he come over there and inspect the premises and we enter into a five-year lease, and he would use the first floor for storing his merchandise and the second floor he had printing presses, and some on the third floor, had printing presses. And he continued to use the driveway and the first floor on the front of the building.

Q. When you say the driveway, do you mean the right-of-way adjacent to the railroad tracks? A. That is right,
73 he was using that to go to the second floor and on the front of the building, the auxiliary alley though on the first floor, because that is the only entrance to the first floor.

Q. Now, was access to the second floor of his building through the north side of your property or the west side of your property? A. West side.

Q. And access to the first floor of the property was through the auxiliary alley? A. Yes, sir.

Q. Which runs along the northerly side of your property, is that correct? A. The auxiliary runs—

Q. The auxiliary alley is on the northerly side of your property, isn't it? A. Yes, that is correct.

Q. Does that run from the right-of-way or driveway to the alley? A. Yes, sir.

Q. Now, what other access is there to the building that was leased to Mr. Lawrence other than this auxiliary alley? A. No other.

Q. No other? A. No, sir.

74 Q. What use was made of the main alley for vehicular traffic in connection with Mr. Lawrence's business?

* * * * *

Mr. Wheatley, Jr.: What use was made of the main alley for vehicular traffic to and from Mr. Lawrence's place of business?

Mr. Denit: He has already said none.

Mr. Wheatley, Jr.: No, he said they were both used, the driveway and the auxiliary alley.

The Witness: That is right.

Mr. Denit: The driveway was used for the purpose of access to the second floor of the sausage factory building and the auxiliary alley was used for access to the first floor.

The Witness: That is correct.

* * * * *

The Witness: Naturally it was used to the main alley, because that was the shortest way out.

Mr. Denit: I move to strike out the answer as not responsive.

By Mr. Wheatley, Jr.:

75 Q. Don't say what you mean by naturally, tell us what use was made. A. Well, they were going into the main alley and straight out to Benning Road.

Q. Through the main alley straight out to Benning Road? A. That is right.

Q. What other remodeling or renovation did you make within the premises? A. May I come back on that, then the Bureau of National Affairs, they lease this building, first I forgot to mention, first I leased this first floor to the Manhattan Storage Company, that was before David Lawrence.

Q. All right. A. And the Manhattan Storage had a month or two month lease and what they were storing, they were using heavy trucks to come into the first floor because

they were storing oil filter for the Navy, see, and they were coming in through the main alley and both into the driveway because they were in a hurry to store them.

Then, David Lawrence rent the first floor to Smith Storage Company and they were using the same way.

Then, I begin to start to work in the machine shop where is what I mentioned before, I think, the large room, because I had a lease, see, to lease to him. So, I remodeled that, I repair it, I put this boiler, I complete it to the man's satisfaction and I lease it to Call Cal.

76 Q. And how long was that occupied? A. That was occupied a little over a year.

Q. What type of business was that? A. It was laundry.

Q. Laundry business? A. That is right.

Q. What use was made in connection with that business of what we have called the main alley? A. He was using the main alley to make a turn to go straight on Benning Road. In other words, he was coming straight to the driveway into the property and going out to the main alley straight on Benning Road.

Q. Now, what type of vehicles used that main alley? A. Trucks, if I recall right he had six trucks.

Q. And over what period of time was that? A. Well, it was over a year. Now, I am jumping too fast—see, while he was working there, then I remodel the three-story building and I lease that to the Capital Tool Company. And this is the building that the corner was in danger situation; and he was using nothing else but the main alley all the way through.

Q. Using it for what, Mr. Cogito? A. For bringing in his material and his merchandise and his cars.

77 Q. By vehicles? A. By vehicles, yes, sir.

Q. How long did that continue? A. He had a three-year lease.

Q. Now, what other uses were made of that property that you acquired? A. After I had leased this building, I begin to build on the back section, what was originally Par-

cel 168/6, and I put in a building there. It is 150 foot long, by 57 foot wide; and all of the material, it came through the main alley.

Q. All of the material came through in what manner? A. In trucks, for instance, I had over 60,000 bricks, cement, sand, reinforced steel, everything that was necessary to building a building.

Q. Now, is there a business conducted from that business now? A. Yes, sir, Benning Terminal Warehouse, Inc.

Q. What access facilities are used in connection with that business? A. Well, it is coming through the main alley and also coming through the driveway, all depends the traffic that is in the property.

* * * * *

78 Q. Mr. Cogito, is there or is there not a gate leading from your property onto the alley on the east side of your property? A. Yes, I put in the gate exactly where the plans, that they were going to reconstruct it, show.

Q. And with respect to the distance along in front of your buildings, the north end, how far is that back along the alley? A. Well, it is about 130-135 feet, maybe 137, nearby there.

Q. Now, do those gates remain open during the business hours? A. Working hours, yes, sir.

Q. And do trucks come in and go out through those gates onto that alleyway? A. Yes, sir.

79 Q. Can you estimate the number of trucks a day, the number of trucks that have gone over that property? A. No, it is impossible, Mr. Wheatley, to estimate it, but I say it is more than ten.

Q. More than ten what? A. Trucks.

Q. A day or week? A. More than ten a day.

Q. Has that continued ever since you acquired this property? A. Well, in my opinion, it has.

Q. Not in your opinion, but have you seen trucks go back and forth? A. Yes, indeed.

Q. Over what period of time has that been? A. Well, from the very beginning of 1942, October 1942 up to the last time I was there.

Q. That was when? A. The last time I was there, I think, was about ten days ago.

Q. Now, Mr. Cogito, after your conversation— A. I beg your pardon, the last day I was there was April 5.

Q. Mr. Cogito, after your conversation with Mr. Kogod in, I think you said, October 1942, did you have any
80 further conversation with him relative to the use of the alleyway? A. Yes, I did.

Q. When and where was that? A. It was in 1945, in August of 1945; I think it was August, it was a terrible flood there.

* * * * *

I made an appointment with Mr. Kogod and went to his place of business on 14th Street, I think I am right, on 14th Street. And the appointment was for the next day at 11:00 o'clock.

* * * * *

Q. When did you say that was? A. 11:00 o'clock in the morning.

* * * * *

81 Q. Do you have something you can refer to, to give you the reference date? A. Yes, indeed.

Q. What is that? A. A letter I addressed to Mr. Kogod on May 16, 1945.

Q. Was it in relation to that? A. That is right.

Q. And it was about that time that you had this conversation? A. No, the conversation that I had was on the 28th of December, 1944.

Q. The conversation with him you were about to relate was the 28th of December, 1944? A. That is right, sir.

Q. All right. What was the conversation with Mr. Kogod? A. Well, the first, I went there to instruct him to correct the error that he made on a grading of his

place. The way he graded all the surface water, every time there is a heavy rain, it floods my place. And I went there to correct the situation. He asked me, "Why can't we come to an understanding that I sell you this piece of land and you could correct it?"

82 The Court: You mean the alley?

The Witness: No, sir, the alley was a portion included in the portion of the place.

The Court: All right.

By Mr. Wheatley, Jr.:

Q. That was the land northerly of your building? A. Of the front building.

Q. It would have included the property known as the auxiliary alley? A. And the alley.

Q. All right. What happened then? A. Then, we took the subject of his liability on the surface water and he give me an example that he had another complaint from a property that he owned, I don't remember whether he said on Massachusetts Avenue or Connecticut Avenue. Well, to that, I didn't want, I told him, "I am not a lawyer and I feel that you have caused me considerable damage and that we could repair in a friendly manner," I said, "I am willing to stand part of the expense and I assume you should stand the other part of it." Then, he suggested about buying this place, the front portion as well as the portion of the alley. I stated to him then that I would employ an appraiser and have it appraised, this parcel of land that he and I were talking about, which I did. And on May 18, 1945, I wrote him the letter which, if you wish it, here is the letter.

83 Q. That was with respect to the property? A. As well as to the easement.

Q. Beg pardon? A. As well as to the easement.

Q. What you were to buy was the property north of your place of business between your place of business and Benning Road? A. That is right.

Q. On which there was a vacant yard at the time, was there not? A. That is right, vacant land.

* * * * *

The Court: Is that the piece of land where the stock-yards office was?

Mr. Wheatley, Jr.: Yes, Your Honor.

By Mr. Wheatley, Jr.:

Q. Did you write to Mr. Kogod with respect to that? A. Yes, I did.

84 Q. When was that, Mr. Cogito? A. May 16, 1945.

Q. Was the question of the easement or the alleys, or the rights involved in that sale? A. Yes, indeed.

Q. In what way? A. Well, the letter is self-explainable.

Mr. Wheatley, Jr.: We offer this in evidence.

Mr. Denit: No objection.

Deputy Court Clerk: No. 22.

(Letter dated May 18, 1945 to Mr. Kogod from Mr. Cogito, was marked Plaintiff's Exhibit No. 22 for identification and received in evidence.)

The Court: All right, sir.

By Mr. Wheatley, Jr.:

Q. Mr. Cogito, did there come a time somewhere around 1943, when there was some excavation on the property owned by Mr. Kogod? A. Yes, sir.

Q. When was that? A. In the spring of 1943.

Q. Now, tell us what happened in connection with that. A. Well, I saw a contractor excavating in Mr. Kogod's premises.

Q. That is the property east of your property? A. That is right.

85 Q. All right, sir. Where was that with respect to the alley? A. Well, he start in the beginning from Minnesota Avenue and coming towards my place, coming west. So, when the operator that was operating the shovel was almost reach to the easterly line of the alley, I stop

him and I went there and I said, "Listen, lad, you have no right to dig this alley." I said, "If you do, you are going to answer in court." He was a nice fellow, he said,—

Mr. Denit: We object to that.

By Mr. Wheatley, Jr.:

Q. All right. Did Mr. Kogod come? A. After the operator called Mr. Kogod and Mr. Kogod and the contractor came.

Q. All right. Where were you talking? A. Mr. Kogod wanted to excavate.

Q. Where were you at that time? A. In the alley.

Q. In the alley? A. That is right.

Q. And this was at about the same time you just mentioned? A. Yes.

Q. All right, sir. What happened? A. Well, Mr. Kogod claimed that was his property and I told him I did
86 not dispute whether it was his property or not. I said, "I have the right to the alley," and I said, "If you will excavate it, you are going to answer in court for my damages." The contractor told Mr. Kogod how long I had the property, and how long he had the property, and the contractor told to Mr. Kogod, "There is a three years' time limitation." I don't know what he meant by that, but that is the exact words that he said to Mr. Kogod.

I said, "Three years or not three years, this is my property, I have the right." When I said my property, I show them the building, I said, "I have the right to this roadway and if you gentlemen proceed to anyway interfere with the alley, you will answer me in court for my damages."

Q. Then what happened? A. They didn't dig the alley.

Q. They did not dig in the alley? A. No, sir.

Q. Did they dig anywhere else? A. Yes, indeed, they grade all his land.

Q. Up to the alley? A. Up to the alley, yes, sir.

Q. And when did you have any further conversation with Mr. Kogod relative to an obstruction of the alley? A. I

think it was in 1946. Mr. Kogod begin to excavate, somebody begin to excavate, I don't know who it was, they were excavating for a Woolworth's store.

87 Q. On Minnesota Avenue? A. Yes, and the surplus dirt they were piling in the lot edging to the alley. So, Mr. Kogod, that is where I have put in a string with a little sign across the bridge, "No Trespassing." The officer called me up and I right away went there and soon as I arrive on the premises, Mr. Kogod came there and he says with a nice smile, "I don't want you to feel that I am trying to overstep over you." He said, "I put in that sign there in order to eliminate the danger that the trucks to go in and out." Well, that was a reasonable excuse, so I said, "O.K., Mr. Kogod, that being the case, how long do you think it will take you to have the excavation pile up?" He said two or three days. Well, then, the best thing to do, we take the string out and we keep the gate closed, and if there is any traffic to come in, I detour the traffic, I told the tenants to detour the traffic to come to the driveway.

Soon they stop, probably two or three days later, they stop piling this dirt, not in the alley but outside the alley on each side of the alley, so we open up the gate again.

Q. What happened to the string across the road? A. Oh, we took it out immediately.

Q. Took it out immediately? A. That is right, I sent a man to take it out.

Q. How long did that condition continue, two or
88 three days? A. Two or three days that I agree to close up the road, so to eliminate the danger.

Q. You agreed with him to do that? A. I did, I closed the gate.

Q. When was the next time, if at all, when there was any attempt made or anything done to close the alley? A. In 1948, yes, in 1948.

Q. What was that? A. Mr. Kogod's son-in-law, I don't recollect his name now, he went to my tenant, to the Ameri-

can Company Millwork there, and told him that he was going to close the roadway.

* * * * *

Q. Was the roadway closed? A. No, sir.

Q. Now, then, did there come a time when the road was actually barricaded or closed? A. Yes, sir.

Q. When was that? A. 1949.

Q. Do you know the date? A. I don't remember the date, sir.

Q. Is that the date that was alleged in the complaint? A. In the complaint, yes, sir.

Q. Now, tell the Court what were the circumstances
89 with respect to that occasion. A. Well, the officer of the Benning Terminal called me up and they said they were closing—

Mr. Denit: We object.

By Mr. Wheatley, Jr.:

Q. Don't tell us what somebody told you. You went there, didn't you? A. I went there immediately.

Q. Tell the Judge what you saw. A. I say they were placing, they had the post hole already dug across the gateway, about a foot away from the gate.

The Court: That is out to the Benning Road?

The Witness: No, on the alley, Your Honor.

The Court: I know, but that is—

The Witness: To the road leading to Benning Road, yes, sir.

The Court: All right.

By Mr. Wheatley, Jr.:

Q. That is the alley that runs alongside your place of business out to Benning Road? A. That is right.

Q. With respect to your place of business, where was the barricade?

The Court: They didn't close up the entrance to
90 alley at Benning Road?

The Witness: Not at Benning Road, no, sir.

By Mr. Wheatley, Jr.:

Q. Did they close it at the gate of your property? A. At the gate of my property, yes, sir.

Q. What was the situation there? A. I went there and saw Mr. Kogod's son-in-law. I told them, "Don't go any farther until I get in contact with your father-in-law," and I tried to reach Mr. Kogod at his office on Upshur Street and they wouldn't tell me where he was or where he went, and then I insisted with the girl on the telephone, whoever answered the call, that I must see Mr. Kogod in order to avoid him a headache and to myself.

* * * * *

I was not able to get hold of Mr. Kogod, so I went there and talked to Mr. Kogod's son-in-law and I told him—

Mr. Denit: We object to that.

By Mr. Wheatley, Jr.:

Q. Mr. Cogito, was there a barricade erected across there? A. Yes, it was.

91 Q. What is the nature of that barricade? A. I think it was four posts dug in the ground, anchored with concrete, and then a sign placed on, right in front of my gate, that I could not get in and out.

Q. What did the sign say? A. Parking for Senator Theater.

Q. Now, did that obstruct entrance into your property or exit from your property across the alley? A. Yes, sir.

Q. How long did that continue? A. I think it was continued for about a week or ten days.

Q. Until the time that the stipulation was filed in this case? A. That is right.

Q. And was it then removed? A. Yes, sir.

Q. And has the alley remained open since then? A. Yes, sir.

Q. And there was no attempt to block off the alley from the Benning Road entrance? A. No, sir.

Q. Now, Mr. Cogito, how is your property zoned? A. Industrial, heavy industrial, I don't remember how they call it, in order words you could put in a nine-story-high building; it is zoned something, I don't remember.

92 Q. Is it now used for commercial use? A. Yes, sir.

Q. Mr. Cogito, what is the condition of the ground east of the alleyway alongside of the eastern part of your property? A. How you mean, the condition?

Q. What is it used for? A. Now?

Q. Yes. A. Now, it is a parking lot.

Q. Parking lot for what? A. Well, for the stores that are fronting on Minnesota Avenue and the Senator Theater, and the drug store and the post office.

Q. Is that in the same condition now that it was when you acquired your property? A. No, sir. You mean today? No, sir, it has been changed.

Q. In what way? A. Well, the parking ground has been enlarged now. When I went there in 1942, it was only the Senator Theater and perhaps the People's Drug Store and another little, maybe one or two stores, I don't remember. Now, it is well built up.

The Court: That didn't encroach on the driveway in dispute, as I understand it.

The Witness: No, sir.

93 By Mr. Wheatley, Jr.:

Q. Did there ever come a time when there was a dispute between you and the Senator Theater relative to your trucks, or trucks coming to your place, going across that parking lot? A. Yes, the manager of the Senator Theater wrote to me stating—I have his letter here—that my trucks—

Mr. Denit: The letters are the best evidence.

By Mr. Wheatley, Jr.:

Q. There was a dispute about the parking lot use by the trucks, is that right? A. That is right.

Q. And did you take steps to stop the use of the trucks—

The Court: How wide is this alley?

Mr. Wheatley, Jr.: Twenty-five feet, sir.

The Court: Twenty-five feet?

Mr. Denit: We don't agree that that is correct.

Mr. Wheatley, Jr.: You did by your stipulation.

Mr. Denit: Oh, no, we said it was described with substantial accuracy in the complaint. We didn't attempt to, and have never agreed that it is 25 feet wide.

The Court: I see.

Mr. Wheatley, Jr.: In paragraph 18 of the complaint, which is in the stipulation entered in evidence yesterday, the alley is approximately 500 feet with approximate width of 25 feet.

94 The Court: All right.

Mr. Denit: Well, if counsel insists that we are bound by the stipulation, may I say to Your Honor that that was inadvertent on my part. I assumed that it was correctly described, but I went there and saw the property and it is not 25 feet wide.

The Court: Well, you wouldn't bind this Court anyhow, as far as that is concerned.

By Mr. Wheatley, Jr.:

Q. Mr. Cogito, is your property now occupied for industrial and commercial purposes? A. Yes.

Q. Now, with respect to the—you mentioned early in your testimony that when you went out to see the plant in 1942, there was a roadway along the easterly side of the building.

A. Yes, sir.

Q. And an alleyway along the southerly side of your place. A. Yes, sir.

95 Q. What do you call the new building you built?

A. I call it Building A.

Q. Is that against the southerly part of your ground?

The Court: Is that the sausage factory?

The Witness: No, sir.

The Court: What you call here the "cooler" building?

The Witness: No, sir, further out, Your Honor, further south.

The Court: The abattoir?

The Witness: At the end of the abattoir, I think is the fertilizer, that is the building we are talking about now.

* * * * *

Q. Mr. Cogito, I show you the survey plat, I show you the exhibit which has been identified as Plaintiff's Exhibit No. 13, and ask you if that is the survey of the property owned by you, conveyed by Exhibit No. 2. A. Yes, it is.

Q. What is on the western side of your property? A. Western side, the railroad side.

The Court: That would be the side next to the railroad, wouldn't it?

Mr. Wheatley, Jr.: That is right, Your Honor.

The Witness: The railroad side.

96 By Mr. Wheatley, Jr.:

Q. Does your property abut against the property line of the railroad? A. Yes, sir.

Q. What access facilities are available to you on the northerly side of the property owned by you? A. On the northerly, the west side you mean.

Q. On the northerly side. A. On the northerly side, will you please define?

(Counsel indicated the area on the plat.)

The Witness: That is right, it is the driveway.

The Court: Is that the paved road up there?

The Witness: Asphalt paving, Your Honor.

* * * * *

By Mr. Wheatley, Jr.:

Q. What else, Mr. Cogito? A. Then, there is the roadway or the auxiliary alley, we call it, that comes from here to here.

Q. The auxiliary alley? A. That is right, from west to east.

* * * * *

97 Q. The driveway, Mr. Cogito, is that shown on the plat? A. Yes, sir.

Q. Is the auxiliary alley shown on the plat? A. Well, it is vacant land, it doesn't show on the plat, but it is vacant land; it shows from the northerly building to Benning Road is empty land. Yes, it does show here, the auxiliary alley, there is the intersection.

The Court: Let me ask you this: Does the plaintiff contend that this alleyway in dispute is exclusively for the use of the plaintiff's property, or is it for the use of the plaintiff's and the defendants' properties, or the use of the general public?

Mr. Wheatley, Jr.: No, it is for the use of the plaintiff and the defendants, and any other person owning property along that property line. While the plaintiff now owns it by acquisition from one deed, these were owned in five different parcels during intermediate years, so it could have been owned by anyone who owned the property adjoining.

The Court: I see.

Mr. Wheatley, Jr.: To straighten the question of record, we admit the fee simple title stands in the defendants.

The Court: The defendant has an easement, also, on it?

Mr. Wheatley, Jr.: Oh, yes, Your Honor. We only claim the right to use the roadway.

98 Mr. Denit: You don't mean the defendant has an easement, the defendant has a fee simple title.

The Court: If the plaintiff has an easement, then the defendant doesn't have an easement necessarily, even though he is a title owner of the property; even though the defendant is the title owner of the property, that doesn't mean legally that he also has an easement on this property, on this alley, provided the plaintiff has an easement on the property, isn't that true?

Mr. Denit: He has a fee simple title, Your Honor.

The Court: Even if you have a fee simple title, if the plaintiff has an easement, you don't necessarily also have an easement.

Mr. Denit: No, I don't think you could.

The Court: Plaintiff says both of you have an easement, as far as that is concerned, that is his claim and that is his only claim.

By Mr. Wheatley, Jr.:

Q. Now, Mr. Cogito, with respect to the property, the roadway or the alleyway along the easterly side of your property, what is the length of that alley or roadway? Does it run from the southerly end of your premises to Benning Road? A. To Benning Road, yes, sir.

99 Q. What is the approximate length? A. Approximately it is 500 and some-odd feet.

* * * * *

100 The Court: This right here (indicating)?

The Witness: That is right, sir.

The Court: All right, thank you.

* * * * *

Q. Mr. Cogito, is the building which is shown in the picture with the sign "American Company Millwork and Lumber Company," the same building that was shown in the plot plan as the sausage factory and lard department? A. That is correct, sir.

Q. Mr. Cogito, there appears on the picture a culvert, is that culvert in the same position as it was at the time you acquired the property? A. Yes, sir.

Q. Would you show that culvert to His Honor? A. This is the culvert here.

The Court: Is that the alley?

The Witness: That is the alley, it is the same picture.

101 The Court: All right. Now, gentlemen, this auxiliary road which is on the west side of the alley, is the record title of that in the defendant also?

Mr. Denit: Yes, sir.

The Court: All right.

By Mr. Wheatley, Jr.:

Q. Mr. Cogito, I show you Plaintiff's Exhibit No. 19-D and ask you to point out to the Court on that picture the locations of the alley and the auxiliary alley. A. The auxiliary alley, now, this is the same picture, the only difference in this, the camera was looking east, what we want to show in this picture, the parking lot and the auxiliary alley which is on front here.

The Court: Is this the parking lot?

The Witness: No, the parking lot, Your Honor, is way back here where you see those cars parked.

The Court: All right.

* * * * *

Q. Mr. Cogito, I show you picture No. 19-E which was introduced in evidence. Will you point out to the Court where it is that Benning Road is shown on that picture and where it is that the alleyway is shown? A. This picture is looking east, Your Honor, and we show the intersection of Benning Road and Minnesota Avenue over here, and here is the intersection of the alley; it is
102 between this post and the hydrant going straight through to the picture that you saw before.

The Court: All right. This is the old building, that is the ruins of a building, isn't it?

The Witness: No, sir, that is piled lumber.

The Court: I see.

The Witness: And this shows the post office also, this is the post office.

By Mr. Wheatley, Jr.:

Q. Now, the lumber that is shown in the picture, that is physically located on the part shown in the plot plan before His Honor as the stockyard office grounds, is that right? A. Correct, sir.

Q. I show you Plaintiff's Exhibit No. 19-F and ask you to show His Honor where it is that the Benning viaduct is shown in that picture and where it is that Benning Road is shown in that picture. A. Well, the viaduct is right over here, Your Honor, and then here is the Benning Road, the sharp "U" turn, and you go back on Benning Road.

The Court: Yes, I see that.

By Mr. Wheatley, Jr.:

Q. I show you Exhibit No. 19-C and ask you to point out to His Honor where it is the alleyway is shown thereon.

A. Well, partially, Your Honor, this is the alleyway
103 we are talking in question, this is right over here;
of course, the other pictures, you have seen the continuation of that.

Q. I show you Exhibit No. 19-B and ask you to point out to His Honor where the alleyway is shown thereon.

The Court: Let me look at this a moment. (Referring to No. 19-C.) All right.

The Witness: This is the extension, as Your Honor would see from here, this is an alley, I can show it in here. This is the alley that you see here, which is the same one over here (referring to No. 19-B).

The Court: What is this here?

The Witness: That is part of the lot.

The Court: The parking lot?

The Witness: No, that is part of the alley which goes through to Benning Road.

By Mr. Wheatley, Jr.:

Q. Where was the picture taken from, Mr. Cogito? A. This picture was taken from north, looking south, in other words, in this picture you be able to see if you got the extension of 35th Street.

Q. I show you Plaintiff's Exhibit No. 19-C and ask you to tell His Honor where that gate is, as it appears in the picture, with respect to your property and the alley. A. Well, the gate is in my property and is the exit from my

property into the alley, which Your Honor will observe it is right over here. See where it makes this little curve (referring to 19-B). It is the same thing coming up through here (referring to 19-C).

Q. I show you Plaintiff's Exhibit No. 19-J and ask you from what point of view that picture was taken and where the property owned by you is shown thereon? A. It was taken looking north practically from 35th Street, showing alongside my property the alley that goes to Benning Road. It is facing north.

The Court: All right, sir.

By Mr. Wheatley, Jr.:

Q. Mr. Cogito, I show you Plaintiff's Exhibit No. 15 and ask you to identify for His Honor thereon, the position of Benning Road and the position of the alley on the east side of your premises. A. This is, Your Honor, the intersection at Benning Road and as you would see it going straight through alongside of my property.

The Court: I see.

By Mr. Wheatley, Jr.:

Q. Mr. Cogito, the picture identified as Exhibit No. 15 and the picture identified as No. 19-E, reflect the same area at different periods of time, is that correct? A. That is correct, sir, only this is a smaller picture and this is a larger picture, as you will observe.

105 Q. And the Benning Viaduct is shown in each picture? A. Both, yes, sir.

Q. And the fire hydrant is shown in each picture? A. That is correct.

Q. And in 19-E and 15, the telegraph pole just westerly of the alleyway is shown in each picture? A. That is correct.

Q. Now, Mr. Cogito, at the time you first went there in 1942 to inspect the premises, you said that the walls were propped up alongside the easterly side of your property, is that correct? A. That is correct.

Q. What was the nature of that property? A. Well, it was to support the wall and it was a bracer with a three-inch plank, the plank were about, I would say, 16 feet long.

Q. I show you Exhibit No. 18-A and ask if you will identify to His Honor thereon, where the planking and shoring was that held up the wall? A. Here is the props, Your Honor, if you need to have a—I have an enlargement.

The Court: Props of what?

The Witness: The props supporting the wall which are anchored on the alley.

* * * * *

106 Q. Mr. Cogito, I show you Exhibit No. 14-A which has been introduced in evidence in this court, and ask you to point out to His Honor thereon, the area shown which is now owned by you.

* * * * *

108 A. Well, it is edging to the Union Stock Yards, this is the property and here is the alley that we are talking about, the main alley, and here is another alley that was going to another road.

The Court: Is Benning Road on here?

The Witness: Benning Road runs east and west, that is right, this is Benning Road and this is now Minnesota Avenue, that was then Anacostia Road.

The Court: This is the alley you were referring to?

The Witness: No, sir, this is the alley here (indicating).

The Court: Which is your property?

The Witness: This is the property from here, Your Honor. It is approximately from here to between here.

* * * * *

The Court: All right. As I understood the defendants' counsel's statement, he didn't say that there hadn't been an alley there for a great many years, but it was his alley, the defendants' alley.

Mr. Denit: That is correct.

The Court: There is no question about there being an alley there?

Mr. Denit: No, sir.

The Court: All right.

109 Mr. Wheatley, Jr.: There is no question about there being an alley alongside these premises for a great many years?

Mr. Denit: No, no question about that.

The Court: All right.

* * * * *

Cross-Examination

By Mr. Denit:

Q. I understood you to say on direct, the first time you saw this property was in the fall of— A. In July, 1942.

Q. In July of 1942? A. That is right.

Q. You had not been there prior to that date? A. I have no recollection.

Q. So that you don't know anything about the condition of the property prior to that date? A. Well, only what I read through the papers.

Q. You had not seen it prior to that date? A. I don't remember.

Q. Well, you mean that you are in doubt?

The Court: Legally, he says he never saw it before.

Mr. Denit: All right, sir.

By Mr. Denit:

Q. Now, I understand further that you went upon the property in the month of October, 1942? A. That is
110 correct.

Q. And placed some lumber there? A. That is correct.

Q. When did you acquire title to the property? A. September 30, 1942, that I put up the deposit.

Q. You didn't get a conveyance until February, 1943, did you? A. That is correct.

Q. Between July of 1942 and February of 1943, did you make any effort to ascertain the property lines of the property you were buying? A. 1943, yes, I ordered the District of Columbia survey.

Q. And you received that survey prior to take a deed from the trustees in bankruptcy of Adolf Gobel, is that correct? A. I think so.

Q. The survey that you obtained is the survey which has been admitted in evidence in this case as Plaintiff's Exhibit No. 13? A. Yes, it is, this is it, I don't know whether it is Exhibit 13, but this is it.

Q. This survey indicated to you, did it not, the property you were acquiring was embraced within the solid black lines? A. Yes, that is right.

111 Q. And you understood from reading the survey that you were acquiring a right of way into Benning Road, approximately 20 feet wide? A. That is right.

Q. Over the paved highway? A. That is right.

Q. Did you also understand you were not receiving a record title to any other rights of way? A. No, sir.

Q. Did you read the deed that you obtained from Gobel? A. I read it after—

The Court: Did you say a right of way 20 feet wide?

Mr. Denit: Twenty-five feet wide.

The Court: That is the right of way we are talking about?

Mr. Denit: No, that is the undisputed right of way at the end of the property going into Benning Road designated as paved road on the plat Your Honor has.

* * * * *

By Mr. Denit:

112 Q. I ask you whether or not you understood from the deed that you obtained from Adolf Gobel, you were getting a right of way over the paved roadway into Benning Road and no other right of way? A. I don't say no other right of way; it say all the title and interest

that Gobel had in the property north, east and south, that is what the deed said.

Q. All right. And immediately after acquiring title to the property, you placed a mortgage on it, did you not?

A. That is true.

Q. Did you require that there be inserted in the mortgage a description of any right of way other than the 25-foot right of way into Benning Road? A. I didn't require that, no, why should I require that?

Q. I just asked you if you did. A. No, I didn't require that.

Q. That mortgage was for \$30,000, was it not? A. That is right.

Q. Subsequently, you obtained another mortgage, did you not? A. That is true.

Q. For \$75,000? A. No, for \$50,000—yes, first \$30,000, then \$50,000, then \$75,000.

Q. On three successive occasions, you mortgaged
113 the property? A. Well, if you call it that, yes.

Q. In either of the three mortgages, did you require there be a description of the so-called main alley and the auxiliary alley? A. No, I did not. I was interested in getting the money, that is the bank's business if they saw fit, necessary, they would call to that.

Q. In either case, you executed the mortgage personally, did you not? A. Yes, indeed, sure.

Q. And it is a fact, is it not, that in neither mortgage, the first, second, or the third, was there any reference made to the so-called main alley or auxiliary alley, isn't that right? A. With the exception of the deeds, the deeds specify the alley.

Q. I am asking you about the mortgages, isn't that correct? A. My mortgage, you mean?

Q. Yes. A. No.

Q. Is it correct or not? A. You are correct.

Q. So, there was no reference in any one of the
114 three successive mortgages to this so-called main alley or auxiliary alley? A. That is correct.

Q. In your letter to Mr. Kogod in October, 1942, in evidence as Plaintiff's Exhibit No. 20, you use this language in the second paragraph:

"Mr. Nelson inform me over the phone on the 21st current that these props have been there for over twenty years."

What did you mean by that? A. Exactly the props that we are talking about that were supporting the walls, that is what Mr. Nelson, who was formerly president of Gobel, Incorporated, and who was the trustee—

Q. You mean props had stood there for 20 years in this so-called main alley? A. Well, I don't think that is what they exactly meant, for 20 years.

Q. Well, what did you mean when you said, "Mr. Nelson informed me that these props had been there for over twenty years"? A. For over twenty years, Mr. Nelson also told me that the best reference that got it was from the attorney, Mr. Clark, who was their attorney, and I called Mr. Clark and Mr. Clark stated—

115 Mr. Denit: I object to that.

The Court: You have asked him.

Mr. Denit: I asked him what Mr. Nelson informed him.

The Court: I know, but that is part of it.

Mr. Denit: That is pure hearsay.

The Court: I know, the whole thing is pure hearsay, but you asked for it. Go ahead, sir.

The Witness: Mr. Clark told me that in 1936, when the architect for the reconstruction of the Gobel plant, they went over with the architect pertaining this alley and they discover in a deed prior to the Gobel purchase, that they had the implied, I think, the implied grant of the alley.

The Court: Had the what?

The Witness: Had the implied grant of the alley. I asked Mr. Clark if he would mind go ahead and look it up for me and whatever time he had put on it, I would be glad to pay him. He told me it was not necessary, he said, you go at the Recorder of Deeds and look at the deed of May,

1906, read that deed thoroughly and that will answer all your questions there, and I did that, sir.

The Court: Is the 1906 deed in evidence?

Mr. Wheatley, Jr.: Yes, Your Honor.

By Mr. Denit:

Q. Were the props there when you went on the property? A. Yes, indeed.

116 Q. Now, wait a minute, when you went on the property in July, 1942? A. Yes, sir.

Q. Was the road or so-called alley being used at that time? A. Well, it was not apparently every day use, but it was some use, it was weeds between the cobblestones.

Q. As a matter of fact, there weren't any tenants on the property at that time, were there? A. No.

Q. And wasn't the property in a dilapidated, almost demolished condition? A. That is right.

Q. Now, did you see any trucks using that alleyway on that day? A. No, sir.

Q. Did you see any trucks using the alleyway in October of 1942? A. No, sir.

Q. You did not use any trucks in October, 1942, did you? A. No, sir, only with a car.

Q. I show you Plaintiff's Exhibit No. 18-B, I will ask you to tell us what the structure is on the right-hand side of that photograph, the lower corner? A. You mean
117 this wood railing here with this plank and with this other plank?

Q. Yes, sir. A. From the north corner of the building, northeast corner of this building here?

Q. That building is the so-called sausage building, isn't it? A. Yes, sir, sausage factory, that is a fence.

Q. Was that fence in use at that time? A. Well, there was no fence in use then, see these two planks, he had three planks, you could see the difference, they are new, I put them on there in order to keep the children out.

Q. As a matter of fact, wasn't that a gate? A. No, sir—yes, it is, this was a gate here.

Q. Swinging from the so-called sausage building, wasn't it? A. Swinging northeast.

Q. So as to close the so-called auxiliary alley? A. Oh, no, no, it could not close the auxiliary alley.

Q. Could it close the other alley? A. It could close the section to go to part of the auxiliary alley, yes.

Q. You mean by that, sir, it could close the alley, don't you? A. No, not to close the alley, no, sir.

118 Q. Didn't it swing over across the alley? A. No, across this way, but still it would not reach all the way to the end of the culvert.

Q. You mean it didn't completely close the alley? A. That is right.

Q. But could be used to prevent passageway across the alley? A. That is true.

Q. As a matter of fact, are not some of the original hinges for that gate hanging in that wall of the sausage building today? A. I don't see no hinges on that, Mr. Denit, and I don't recall of any hinges; they may be there, I don't know, I haven't paid no particular attention to that.

Q. Now, I will ask you if it isn't a fact that access to every one of the buildings on your property can be obtained to Benning Road by use of the paved driveway, 25 feet wide, on the extremity of your property? A. If you mean the premises as they are, but then it would ruin my investment because I cannot put the building D as the original was excavated, there I lose all that investment of the footing, I lose the investment of the three walls now standing on it, which cannot be done today for less than \$30,000 or \$35,000.

Q. What three walls are you talking about? A.
119 Those three walls, if you been there, you saw it, was that large lot inside the premises, that is where the chilling was and the abbatoir was.

Q. As a matter of fact, you used one of the walls of the so-called "Chill" room for the wall that now runs alongside your property, did you not? A. That wall, it was 15-

foot high and in order to eliminate the danger, I cut it down to about 8-foot high.

Q. That was a wall for the old building, wasn't it? A. Part of it, yes. But those three walls now we are talking about, we are not talking about one, there is a wall on the west side which extends about, I think it is about 110 feet by 8-foot high and then there is a continuation of the wall on the east side—on the north side, I mean, and also on the east side of the property. The walls are still standing there.

Mr. Denit: Mr. Clerk, will you mark this Defendants' Exhibit A for identification?

(Photograph of area was marked Defendants' Exhibit A for Identification.)

By Mr. Denit:

Q. I show you a photograph which has been marked Defendants' Exhibit A for Identification and ask you if you can tell us what that shows? A. Well, this shows the 120 driveway from Benning Road into my premises.

Now, may I call your attention—

Q. That is the 25-foot driveway? A. That is right.

Q. And that runs parallel with the B. & O. Railroad? A. That is correct.

Q. And runs directly into Benning Road? A. It begins at Benning Road and here is the line of my property, and goes into this platform, into the space to serve the building E, the front building which was the sausage factory. Then, when I purchase the property, this wall that you see in this picture was extended all the way through with the exception of a little hole in here for a man to go under, you follow me?

Q. Yes, sir. A. So, then I cut down this wall here in order to fill in, as I mentioned before, this larger space here that was excavated, with dirt. So, this wall is still standing, I am not able to see the west wall here, which is there still standing, and the east wall is there still stand-

ing. Now, those column footing below here, see where this truck is, that was an excavation 15 foot deep and there is a column 15 foot apart to hold a nine-story building, that is what those plans were designed for.

Q. A nine-story slaughterhouse building? A. No, the plan was not for nine story, but the properties are
121 zoned for nine story building.

Mr. Wheatley, Jr.: Let him point out to the Judge what he has been showing you, Mr. Denit.

Mr. Denit: Yes, indeed.

* * * * *

Q. The fact is, is it not, the 25-foot driveway affords access to every building, every structure, on your property, isn't that correct? A. At this moment, yes, sir.

Q. Now, I show you— A. It did not, though, however, when I purchased the property, that is clear.

The Court: You say it did not at the time you purchased the property?

The Witness: No, sir.

The Court: Why not?

The Witness: Because you see over here, Your Honor, was a wall extended all the way through and in order to go to this high building—

The Court: Is it your testimony you built this paved road, yourself?

The Witness: I didn't build the paved road, no, sir, the paved road was there, the asphalt road. But that asphalt road, where you got your finger, Your Honor, see, in that little place there.

122 The Court: Entered here, you mean?

The Witness: That is right and a little farther this way where you got your finger, Your Honor. No, when I want to go to this high building back in here, Your Honor, it was impossible to go in there.

The Court: You had to dig it out, you mean?

The Witness: I had to fill it in, yes, sir.

The Court: All right.

Mr. Denit: Mark this Defendants' Exhibit No. A-1 for Identification.

(Photograph of area was marked Defendants' Exhibit A-1 for Identification.)

By Mr. Denit:

Q. I show you another photograph, marked Defendant's Exhibit No. A-1 for Identification. I will ask you if that shows the area adjacent to your property? A. Yes, it does.

Q. And the area owned by Mr. Kogod? A. Yes, it does. Now, this picture, as I take it, it was taken from south looking north, shows the alley that we are talking about as well the building that I build on Parcel 168/6, and also the iron fence and part of the front building along the alley and which alley extend to the Benning Road from this picture.

123 Q. All right, sir. Now, at the time you went to the property in July, 1942, was the alleyway as clear and defined as it is in this picture? A. Yes, you could see it—well, no, in this picture it is more clean, in other words, there is very little debris on, while in the pictures of 1942 there were a lot of debris on the alley, like roofing paper on the alley, planks torn out on the alley, broken window frames torn out on the alley, and so forth.

Q. A tree was—no, it was overgrown with grass? A. Not a tree, no, with grass, yes. A tree was right at the edge of the southwest end of the bridge, there was a tree there and I think it is still there, I don't remember right.

Q. Now, the gate you constructed on your property is approximately where on that photograph? A. Well, you cannot very clearly distinguish where the gate is, but it is approximately where this widest part is, in other words, it went through approximately 75 feet from the north corner of the building that has a concrete wall on it.

The Court: This alley runs from Benning Road to what street, if any?

The Witness: It ends there, Your Honor.

The Court: A dead end?

124 The Witness: That is right. I want it to extend to 35th Street.

The Court: All right.

By Mr. Denit:

Q. I will ask you if it isn't a fact that the tenants in your property, using the gate to go back and forth, do not cross the Kogod property and enter directly onto Minnesota Avenue rather than use this so-called alleyway? A. I think that is true.

Q. So that they do not come alongside the sausage building and follow the so-called alleyway, make a right turn into your property, but they come directly from Minnesota Avenue across the Kogod parking lot into the gate? A. Well, to that extent, some is true, take, for instance, the American Express Railroad Company, first, they deliver to the Giant Store—

The Court: You are not suing him for trespass, are you?

Mr. Denit: No, sir, but I am showing they don't use this right of way, the so-called right of way.

The Court: All right.

The Witness: You mean, will you define who, now, please? I admit that there is drivers that goes to the parking lot, because they deliver to the Giant Food Store, they deliver to Kresge and to those stores and go to the Benning Terminal to pick up merchandise. Now, that is true, they
125 come across the parking lot. But most of the traffic when I have been there, and I have seen it, some come—most come through the alley or through the driveway.

By Mr. Denit:

Q. When did you last see any vehicular traffic on that so-called alley way? A. I haven't, the only visit that I was there was on April 5, and I wasn't paying any attention to

the traffic that was going on the parking lot, that is a busy place.

Q. Well, you were there on April 5 to cause the photographs to be made, were you? A. That is right, but I didn't pay no attention to the traffic that was going in and out to the parking lot or to the other stores.

Q. I will ask you whether or not you had a conversation with Mr. Kogod after the construction of the gates in this wall?

The Court: When, approximately?

By Mr. Denit:

Q. When were the gates constructed? A. No, sir, I don't remember any.

Q. When were the gates constructed? A. In 1946.

Q. Now, in 1946 and after the construction of the gates had been completed, did you have a conversation
126 with Mr. Kogod? A. I don't remember.

Q. Did Mr. Kogod ever talk to you about the fact that the gates were left unlocked? A. I don't remember, Mr. Denit.

Q. Did he ever complain to you about trucks going in and out of that gate over this so-called alley way? A. I think he did complain on that and at that time I told him the only way to stop that traffic from crossing his property, it was three-way, I said you could either put a sign there, "No trespassing," it is private property, or put a policeman on the place and tell them not to let them go across there, or I said put a post along the line of the alley way to prevent the trucks crossing into this road.

Q. Were there some posts put up there? A. Well, after, yes, sir.

Q. And were they knocked down by trucks? A. No, the post that you are referring, Mr. Denit, was taken out by Mr. Kogod when they put the sign.

The Court: Put what sign?

The Witness: This sign no parking, "Parking for Senate Theater only."

The Court: It is your testimony Mr. Kogod did put posts up on the east side of the alleyway?

The Witness: Yes, sir.

The Court: Clear out to Benning Road?

127 The Witness: Not clear out to Benning Road, no, sir.

By Mr. Denit:

Q. Approximately to the culvert? A. To the culvert, yes, sir.

Q. As a matter of fact, all trace of a roadway or right of way or alley way beyond the face of the wall of the sausage building had long since been obliterated, hadn't it? A. What you mean "obliterated," no sir.

Q. The Kogod parking lot extended down there, didn't it? A. No, sir, Mr. Kogod parking lot still don't extend to the roadway, because there is a gully to drain the parking lot into the creek.

Q. You mean to tell this Court today it is possible to distinguish between the Kogod parking lot in front of the sausage plant and the so-called alley way? A. Yes, indeed, because you have the drain of the water, I can distinguish it, I don't know about the other people.

The Court: Excuse me, is the parking lot paved?

The Witness: No, sir—yes, I beg your pardon, Your Honor, part of it is asphalt, it is part with a black top asphalt.

The Court: When was it put there?

The Witness: After I acquired the property.

The Court: Let me ask you, what kind of paving
128 is on the alleyway?

The Witness: On the alley way?

The Court: On the alley way.

The Witness: At the time I purchase or now?

The Court: At the time you purchased.

The Witness: At the time of purchase, it was a paved block of flagstone or cobblestone.

By Mr. Denit:

Q. You call it cobblestone, was there any cobblestone on the parking lot? A. No, sir. The parking lot at that time—

The Court: Just a minute, I want to get some facts straight. How far from Benning Road did these cobblestones extend?

The Witness: All the way through, Your Honor.

The Court: All the way through?

The Witness: All the way through.

The Court: All right.

By Mr. Denit:

Q. I show you Plaintiff's Exhibit No. 19-B and I will ask you to indicate to the Court where the cobblestones are, leading from Benning Road? A. Now, we were talking beginning in 1942 when I first went to the place. Now, the cobblestones on this picture only show from the creek
129 up to my entrance and then extended back alongside the building. Now, over here Mr. Kogod done the grading and naturally those cobblestones were then removed since.

Q. Then, it isn't possible today to distinguish between the parking lot and the so-called alley way, is it? A. Well, I would distinguish because you would see this road is more traffic—

The Court: Who took the cobblestones up?

The Witness: If Your Honor please, the cobblestone from Benning Road to this point was removed by the contractor when they done the grading here.

The Court: Whose contractor was it?

The Witness: Mr. Kogod's contractor.

The Court: All right.

The Witness: And the cobblestone from the creek to the entire length are still there with the exception that portion that was excavated when I went there the first time.

The Court: Who excavated it?

The Witness: Gobel Company, Adolf Gobel.

The Court: Who hired them?

The Witness: I imagine, Your Honor, it was the general contractor.

The Court: Was it your predecessor in title?

The Witness: Yes, sir.

The Court: That is all I want to know.

130 By Mr. Denit:

Q. You mean your predecessor in title did this grading in here? A. No.

Q. That is what the Judge asked you. A. What the Judge asked me, who removed the cobblestone from this gate to this building, that is what I understood the Judge to say. Now, that portion, the cobblestone is now removed from here to Benning Road, Mr. Kogod's contractors removed the cobblestones.

Q. You mean to tell the Court cobblestone has been removed in any portion of this so-called alley way back of the face of the wall of the sausage building? A. What you mean, looking south?

Q. Yes. A. Yes, it is. From the gate—where is the gate now—up to this, about 50 feet, where the excavation was when I first went there, the cobblestone was removed.

Q. Don't you know that this very day the cobblestone remains down to the new building you built there and which is used by the Benning Terminal? A. There is a break between the gate and the new building.

Q. Isn't that still paved with cobblestone and
131 grown over with grass? A. You are confusing, Mr. Denit. We are talking about the portion in here. There is a portion cut—may I use this picture—here is the alley way, here is the gate and then from here to approximately here, a distance of about 50 feet, there is no cobblestone.

Q. What is there? A. Just dirt, loose dirt which was filled in by me.

Q. You really don't mean that? A. Yes, I do.

Q. I show you photograph, Plaintiff's Exhibit No. 19-G, isn't there a well-defined road out of your gate onto the parking lot? A. That is correct. Now, if you take from this post here, which is looking east now, to about this post in here, or there, there is no cobblestone because those cobblestones were taken out when the construction of this place, or the abbatoir, was begun. Then, your cobblestone continues from here all the way to the end of my building. Is it clear to you, Mr. Denit?

Q. This photograph, Exhibit 19-G, purports to show the sausage building, is that correct? A. That is right.

Q. And then the wall? A. Standing there.

Q. The wall with the iron fence runs from the
132 sausage building? A. This is a gate, Mr. Denit, don't confuse it for an iron fence, this is a portion of a gate and here is the other portion of the gate. Now, when you close the gate, you don't see no iron fence in here, you just see the walls standing. That is the wall that the props were holding when I got the premises, and your cobblestone extends up right to this post here.

Q. That is the second post in the gate? A. That is right, your southerly post of the gate.

Q. I will ask you, categorically, isn't it a fact that the cobblestone extends from the face of the north wall of the sausage building right alongside of this fence, the gate, clear to the extreme end of your property? A. With the exception of that cut in here, yes, sir, with the exception of that cut that the cobblestone was removed.

Q. Now, do you claim any right of way or easement over any part of this alleyway? A. Yes, I do.

Q. Beyond what is designated here as the second post in the gate? A. Positively I do.

Q. To what point do you claim? A. Let's get the
133 picture, well, this will define from this, this is a corner of the warehouse, from this corner all the way to Benning Road, see, this is the corner of the new building, this building is seven feet in Parcel 168/5.

Q. Do you claim from the wall, the north wall, south wall, east wall, or west wall? A. I claim it from the north line, from the north wall from this point to Benning Road.

Q. Even beyond the gate? A. Positively.

Q. And have you used that alleyway at any time since you occupied the premises? A. You mean behind the gate?

Q. Yes. A. Very little, with the exception of me walking for inspection.

Q. No trucks have been over it? A. No, sir.

The Court: As I understand it, no trucks have been over the alley way from the overpass to Benning Road?

The Witness: Oh, yes. Your Honor. Will you permit me to show to Your Honor?

The Court: Surely.

The Witness: Excuse me, please. You see, Your Honor, this is the south property line of my property. I contend, Your Honor, that I have the right of way to use
134 from here over to Benning Road.

The Court: What about this property here (indicating)?

The Witness: That is right, not all the way through, but this is my property, but I claim the easement from here but not from here, to here.

The Court: But you put your line here, you put your pencil mark here, not here?

The Witness: That is right, this is the south boundary line.

The Court: You claim the easement from the south boundary line?

The Witness: No, sir, I claim the easement from the north boundary line or Parcel 168/6.

The Court: What is your difference between the right of way from the north boundary and the south line?

The Witness: The difference is I would have 50 foot long.

The Court: What is the legal difference, why don't you have it, if you have it at all, why don't you have it all the way through?

The Witness: Because the deed defined that way, the deed of 1906 defined the use of this as south of this property line is excluded in the deed.

Mr. Wheatley, Jr.: That is the 1906 deed, Your Honor.

The Court: I see.

Mr. Wheatley, Jr.: It excluded use of the alley
135 south of the north line.

The Court: Let me see the 1906 deed, please, gentlemen.

(The deed was handed to the Court.)

The Court: I don't want to read all of this, I quit reading writing 50 years ago.

Mr. Denit: If the Court please, if you had this plat that was annexed to the old deed before you, the significance of that language would be clear.

The Court: I don't want to read all of this. I can read it if you find the part.

Mr. Wheatley, Jr.: Yes, sir.

The Court: "To have and to hold the said land and premises and appurtenances unto and to only use of the said parties of the second part and heirs and assigns."

All right.

* * * * *

By Mr. Denit:

Q. In 1945, did you have a conversation with Mr. Kogod and Mr. Grossberg about the closing of these gates? A. About the closing, closing gates, no, sir. In 1945, Mr. Grossberg and Mr. Kogod, if I recollect right, were complaining about the down spout that was in front of the building.

The Court: The what?

The Witness: The down spout, Your Honor, the roof drain, and they were claiming that was on his property. I said, "I don't dispute that is on your property, but the down spout was there when you purchased the property and was there when I purchased the property and is going to stay there."

That is what I told them.

* * * * *

Q. Is it your testimony you never had any conversation with Mr. Kogod or with Mr. Kogod and Mr. Grossberg in which you stated, in substance, that you didn't know the contractor had put gates in the walls? A. Gates?

Q. Gates in the fence and that you would keep the gates locked? A. Mr. Denit, pardon me, you are being misinformed.

Q. I didn't ask you that. A. Gates, there was no gates there, Mr. Denit.

Q. Well, there is a gate in the fence now, is there not? A. Yes, because I put it in there.

Q. I asked you if you didn't have a conversation with either Mr. Kogod or Mr. Grossberg and Mr. Kogod
137 sometime in 1945 with respect to that gate? A. No, sir.

Q. You never had any conversation at all? A. Not with respect to the gate, no, sir.

Q. Did you have any conversation with them or either of them at any time with respect to that gate? A. To that gate, in 1942 that I put it in.

Q. It wasn't put in in 1942, was it? A. Oh, you are talking about the gate that I put in, the entrance?

Q. Yes. A. I am sorry, I misunderstood you. I don't recall a conversation with Mr. Kogod on that or with Mr. Grossberg. I am very sorry, I thought you meant the gate on the north end of the building. Let's define this as the iron gate, so we understand what we are talking about.

Q. Very well, we will define it that way. Is it your testimony today you never had any conversation with Mr. Kogod or with Mr. Kogod and Mr. Grossberg with respect to that iron gate? A. No, sir, I don't have any recollection whatsoever of that.

Q. I will ask you if you deny that you told them, in substance, sometime during a conversation of 1945, that you would keep those gates locked and not permit any-

138 body to come in and out of that alleyway and use the gates for that purpose? A. I don't remember, sir.

Mr. Denit: That is all.

Redirect Examination

By Mr. Wheatley, Jr.:

Q. As a matter of fact, are the iron gates kept open?

A. Daily, except Sunday they are closed, during the business hours they are kept open.

The Court: Excuse me, when were they put up?

The Witness: In 1946, Your Honor, or thereabouts, that was the last work I did on the job. .

The Court: They have been open ever since, during business hours?

The Witness: Yes, sir, with the exception of the two days I mentioned when Mr. Kogod was grading at that time, they was excavating the cellar of the Kresge-Woolworth stores that I agreed to close it.

The Court: All right, sir.

By Mr. Wheatley, Jr.:

Q. Mr. Cogito, you were asked questions about the Defendant's photograph. You were asked by Mr. Denit as to whether or not through that, with respect to photograph offered as Exhibit A for identification by the defendants,

139 whether you had access to all of your property at the present time through that driveway. Do you have access to the first floor of the premises which are in the sausage factory through that driveway? A. No, sir, not through there; commercially, no, sir.

Q. Do you have access, vehicular access, to the buildings on the north side of your property through any other facilities other than the auxiliary alley? A. Will you please repeat that again?

Q. Do you have access to the buildings on the northerly side of your property through that driveway? A. Through here, no, sir.

The Court: Describe where you are talking about, the paved road?

Mr. Wheatley, Jr.: Yes, Your Honor, and that is shown in the Exhibit A for Identification by the defendants.

The Court: All right.

By Mr. Wheatley, Jr.:

Q. What is the vehicular access to the first floor of the buildings on the north side of the property, Mr. Cogito?

A. Only from the alley alongside the building or from this driveway across in front of the northern building where was the sausage factory.

Q. You were also asked, Mr. Cogito, respecting the limitation of access into your property at the time you acquired it, by reason of the wall that was standing,
140 which you took down. Was that the wall of a building? A. Of the building that was burned down in 1933, that is right.

Q. And the wall of the building that was burned down was taken down by you, is that correct? A. Partly, partly still standing.

Q. At that time, was access into the rear area of your property stopped by that wall from the driveway? A. Yes, that is right.

Q. How could you get into the southerly portion of your property? A. Only through the alley.

Q. Only through the alley? A. Only through the alley, no other way in it.

Q. And the building that has been shown at the extreme southerly end of your property, which you have identified as Building A is built on the ground which was conveyed by the 1906 deed, is that correct? A. Correct.

Q. And the access to that at the time that you purchased the property, was through what? A. Accordingly, five feet of that building is in the lot.

Q. Adjoining? A. Adjoining, that is right, because that was only 50 feet and now the building really, measuring
141 ing outside to outside—

The Court: Where was the access to that building?

The Witness: To this building we are talking about, through this alley here, Your Honor, no other way.

The Court: Except through the alley?

The Witness: That is right.

The Court: I see. This paved road extension wouldn't take you there?

The Witness: No, sir.

The Court: I see.

By Mr. Wheatley, Jr.:

Q. Mr. Cogito, with respect to the use of the parking lot as a driveway by trucks operating from your plant and the barricades that were erected by Mr. Kogod that you testified to, did you say those barricades or posts were placed on the east side of the alley way? A. That is right.

Q. In other words, the far side of the alley from your property? A. That is right.

Q. And extending how far? A. I think about 22, 24, 25 feet from the east wall or from the west end of the alley to the east end of it.

The Court: How far from the Benning Road do they extend?

142 The Witness: They don't extend to Benning Road.

The Court: I know.

The Witness: From Benning Road, they extend about 225 feet near that, Your Honor.

By Mr. Wheatley, Jr.:

Q. When were they taken down, Mr. Cogito? A. Never taken down, they are still on there.

The Court: Gentlemen, the Court is going to take a recess until 2:00 o'clock.

My secretary called attention to the fact that traffic is heavy at 4 o'clock, so if it is agreeable to counsel, we will take from the recess at 3 o'clock and go out there, if it is not raining; if it is, we will wait until tomorrow. But I

would like to get a little better picture of the situation before any more witnesses go on the stand; it would be very helpful to me, if I can.

* * * * *

143 Mr. Wheatley, Jr.: Your Honor please, we have no further examination of Mr. Cogito at this time and we were not sure as to whether Your Honor intended to go out to the site now, before we call some other witnesses.

The Court: No, I want to go out at 3:00 o'clock, sir.

* * * * *

Recross-Examination

By Mr. Denit:

Q. Mr. Cogito, you testified that in October of 1942, you caused two trailerloads of lumber to be brought on the premises? A. Yes, I did.

Q. Wasn't it your purpose to use that lumber for the purpose of building a fence around the front of the sausage building? A. A fence had been there, I reconstructed it as it was before.

Q. You were going to build a fence around that?

144 A. Posts had been on that and I reconstructed it to keep the children—

The Court: He says he was going to mend a fence.

The Witness: That is right.

By Mr. Denit:

Q. Didn't you also intend to close the so-called alley way on the east of the building? A. No, sir, never did close that.

Q. Didn't you tell Mr. Kogod that was your purpose? A. No, sir.

* * * * *

Thereupon—**William E. Schmidt** was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

145 Direct Examination

By Mr. Wheatley, Jr.:

Q. Mr. Schmidt, state your name, please. A. My name is William E. Schmidt, S-c-h-m-i-d-t.

Q. Where do you live? A. Well, I reside in Seat Pleasant, Maryland, 530 Addison Road.

Q. What is your occupation? A. My occupation is a letter carrier.

Q. United States Post Office? A. United States Post Office.

Q. How long have you been so employed? A. I am going in my twenty-ninth year.

Q. When did you begin as a letter carrier?

The Court: Twenty-nine years ago.

The Witness: Twenty-nine years ago, approximately.

By Mr. Wheatley, Jr.:

Q. Did you ever have occasion to deliver mail to the place of business along Benning Road which is known or was then known as the Washington Abbatoir? A. That is right, I did.

Q. And over what period of time? A. I served mail in there from 1926 on up until the time that Gobel-Loeffler took over the whole concern in there, as far as the abbatoir and the sausage plants, I don't know whether they
146 went in bankruptcy or what, but anyway when they closed down, I still served their mail for quite a while.

Q. Do you remember what period of time that was? A. Not exactly, no.

Q. Now, Mr. Schmidt, do you ever have occasion to go back into the abbatoir grounds? A. Yes, sir.

Q. And over what period of time was that? A. Well, I would say from 1926 to 1935, 1936, along in there, that period.

Q. That is 1926 to 1935 or 1936? A. Yes.

Q. Now, do you recall a roadway that ran along the east side of the abbatoir buildings? A. I do, sir.

Q. Called an alley, is that right? A. Called it a lane, that is what we used to call it.

Q. Did you ever have occasion to use that? A. Yes, sir, I went back there on special business as pertaining to Government mail and like registered mail for personal delivery only. I had to go back there and get hold of butchers and different ones of that type, when it was personal delivery to them.

Q. Did you have occasion to use that alley, that roadway we are speaking of, on the east side of the place?

147 A. Yes, sir, I used it not only for that, I, as well as others, go back there—I have a little place down in the country in Maryland—I go back there and buy fertilizer, not tons of it, but a little for my garden. I would drive back there and get it, and I also seen plenty of others go in there. I don't know whether it was a public highway or not, no one restricted us from going in there.

Q. Did you use it? A. Yes, sir.

Q. And you say others used it? A. Some others go back to get ice and quite a few colored folks went back there to buy chitlings, that is where they go back there to get the chitlings.

The Court: Did the service that you received and the colored people received and others received, come from the west side or the east side?

The Witness: I would say the east side.

The Court: The east side?

The Witness: Yes, sir.

The Court: That would be the defendants' side, wouldn't it?

Mr. Wheatley, Jr.: That is correct, sir, on the side further away from the railroad.

The Witness: That is right, it is the only way you could get back there.

148 By Mr. Wheatley, Jr.:

Q. Sir? A. That was the only way to go back there to get the supplies.

Q. That was the only roadway back there? A. The only roadway I knew of, sir, and contact—pardon me, to contact the butchers, you would have to go back there because it had been a little office back in there and there was another little cross-road went in there part way, that was the wash-rooms and that is where you could contact the butchers. They went that way, too, back to the abbatoir where they changed clothes, to keep from going through the cold storage plant from the other side; if you come in there, you had to travel through that cold storage plant.

Q. The vehicular way of getting to the southern part of the abbatoir property was only through this roadway on the east side of the property, is that correct? A. That is right.

Q. You called that a lane? A. They called it a lane, they used to call it a lane; that was possibly a nickname, I don't know.

Q. Do you remember how it was paved, Mr. Schmidt? A. Well, coming off of Benning Road, right in front of the entrance to the stockyard office was a little bit of cobblestone, then it was cinders, then when it got on a line, that
149 is a little creek with a little bridge comes in there, when you went over that, it was cobblestones and that went back, well, I would say approximately to where the extreme end, where they had the fertilizer plant where they ground bone meal and that type, Auth, they had a plant back there that was cobblestone in there.

Q. Do you still serve that location with mail? A. No, I am not right on that particular spot, but I am right there, I have been there 25 years, longer than that, 26 years in that one station.

Q. Mr. Schmidt, I show you an exhibit that has been marked 19-B and ask if that picture shows the location of the alley or lane that you have been speaking of? A. Yes, I am referring to this line along here.

Q. Would you show His Honor to what you are referring?

A. Right along here, Your Honor, sir, right alongside of this building.

The Court: Yes, sir.

The Witness: That was the old lane.

By Mr. Wheatley, Jr.:

Q. Now, the culvert that you speak of, is that shown in the picture? A. It seems to be covered over, but there was a culvert coming through here, quite a stream coming through Benning Road right along in here, a line
150 eight or ten feet toward Benning Road from the building is where this culvert was.

Q. And that was cobblestone from there to the rear of the property? A. That is right, yes, sir.

Q. From that point of that culvert to Benning Road was covered with cinder? A. With cinder block except right at the edge of Benning Road there was a few cobblestones, I would say four or five feet of it. I traveled it twice a day, sir, I distinctly remember it.

Q. You traveled it twice a day over this period? A. Twice a day I went in and out.

Q. Both by vehicle— A. And on foot, also.

The Court: You mean you traveled Benning Road twice a day?

The Witness: No, into this property here.

The Court: You went in there twice a day?

The Witness: Yes, sir, I delivered mail there, they had two services a day.

Cross-examination

By Mr. Denit:

Q. Do you recall when the abbatoir ceased operation? A. When the abbatoir ceased operation—well, I think it was somewhere around 1934 or 1935, somewhere in that
151 period, if I recollect right, that is near as I can remember.

Q. Do you recall when there was a fire there? A. Well, I know of two fires they had there, and that was right around that period to the last one.

Q. Was that 1932? A. Somewhere in that period, I couldn't tell you the exact date.

Q. Hadn't the abbatoir stopped operating prior to the fire? A. Yes.

Q. Wasn't the property simply maintained by a watchman? A. After the fire or prior, when Gobel went out of business or whatever it was, their closing down of the plant, in fact everything shut down there except the stockyard.

Q. The stockyard continued to operate after the abbatoir stopped? A. But they still got their mail service over to the plant.

The Court: What plant?

The Witness: Gobel-Loeffler plant.

The Court: I thought they had shut down.

The Witness: They shut down, but I don't know whether it was in the hands of receivership or not, sir, but the mail still went in because, for a while year after that, I went in there and they had one lady taking care of the mail
152 for the whole concern.

The Court: That was about 1934 or 1935, you say?

The Witness: Somewhere along in that period.

The Court: All right, sir.

By Mr. Denit:

Q. Did you deliver any mail to the building where sausage was made? A. Yes, sir, went there also.

Q. And how did you get to that building? A. To go to that place, I went on the opposite side of this building, it is not shown here but on this side here nearer to the railroad track.

Q. You followed Benning Road down farther? A. As far as you could go to the track and went into that drive-

way there where they had a loading platform there and went upstairs on the second floor which was their office.

* * * * *

153 **Ivan Mikalaski (Baker)** was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wheatley, Jr.:

Q. Please state your full name. A. Ivan Mikalaski, call me Baker.

Q. Your name is Ivan Mikalaski? A. That is right.

Q. And you are known as Mr. Baker? A. Well, people call me Baker.

Q. Where do you live? A. Over in Benning, MacArthur Road.

Q. How long have you lived in Washington? A. Since 1907.

Q. Did you ever have occasion to have a place of business in the vicinity of Benning Road, in Anacostia Road, now Minnesota Avenue? A. I have.

Q. Where was that place of business? A. At the corner there on the stockyards property, used to call it Old Benning Hotel, had a meat market in there and restaurant.

Q. Over what period of time did you have that business? A. 1921 to 1939.

154 Q. And that was at the corner of Benning Road and the Anacostia Road? A. Yes.

Q. Do you know where the Union Stockyard's property was? A. Yes, that is the same parcel.

Q. Do you know where the Washington Abbatoir property was? A. Yes.

Q. Did you have occasion to go there? A. Had some business to do in there, had some hogs killed in there and had to haul them out of there.

Q. Sir? A. Had hogs killed in there.

Q. Hogs killed in there? A. Once a week.

* * * * *

Q. Mr. Baker, will you describe to the Court the building on that property there, the Washington Abbatoir property? A. Yes, leave my place of business, out of my yard,

I go right toward the office by Mr. Kuller's office,
155 then I drive in between the slaughterhouse and the stock pens, it is a driveway in there, we had a sort of a loading platform there, used to get off on the killing floor and the hogs after they cooled off.

Q. Was there a roadway or alley that ran down the east side of the abbatoir property? A. That is a roadway, drive in with a truck, turn around, back up to the platform and then come on back out of it again.

Q. Did that roadway extend from Benning Road back to the abbatoir property? A. Yes.

Q. And how was that road paved? A. Half of it was cinders and over toward killing which is called the slaughter floor, outside was cobblestones.

Q. Cobblestones? A. Yes, sir.

Q. How often did you have occasion to go over that road? A. About once a week, generally killed once a week them days.

Q. Over what period of years? A. That is from 1922 up to about 1929.

Q. Now, Mr. Baker, I show you this picture which has been identified as Exhibit No. 19-B and ask you if that road you were speaking of was shown on that picture?

156 A. Yes, that is it. You see, here.

Q. Will you show His Honor so he can see that? A. Yes. We used to go right straight from here straight along there, this is the part, the slaughterhouse is in here, see. That leads up to the back of the slaughterhouse, this house, and right behind that is where we used to load and unload.

The Court: Your place of business was over here?

The Witness: Over here, yes, sir, but it is not on there, but that road went this way and then come out over here to the corner.

The Court: Did anyone else use it besides you?

The Witness: Oh, yes, that was a regular driveway for the people who used to unload the cattle and hogs there; farmers, you know, come in with trucks and wagons.

The Court: How close were you to the entrance?

The Witness: My property, I mean where I was—well, I would say about 200 yards and then about 300 yards along from Benning Road up to the stockyard.

The Court: I see.

By Mr. Wheatley, Jr.:

Q. That was the customary road to get back to it? A. That is the only way to get in there, bring in live stock or take anything that is dressed in the slaughterhouse, to get out, scales there, we used to weigh them all, big
157 scales, farmers bring stuff in. We had to drive in there and weigh off on a big scale and then they had to back out of there and come out again.

Q. Now, Mr. Baker, after the abbatoir facilities were discontinued, was that road still used to go back and forth into that property? A. Yes, to my knowledge it has been in use after the slaughterhouse closed up.

158 Q. You say it was? A. Yes, we had a big fair, then one time McCoy's Circus oxen sale there, that is the place we had to go through there.

The Court: Was the circus on the west side or east side?

The Witness: East side, yes, in the pens.

Mr. Wheatley, Jr.: Your witness.

Cross-Examination

By Mr. Denit:

Q. That east side of the road would be the stockyard property? A. That is right, where the stock pens were,

where they haul horses, ponies, which they sold, that circus.

Q. They had horses and ponies there during the sale, is that right? A. That is right.

Q. I understood you to say that you had pigs killed there from 1922 to 1929. A. Yes, just about that.

The Court: That would be in the abbatoir property?

The Witness: Yes, sir, the abbatoir, yes, sir.

By Mr. Denit:

Q. Were those pigs, hogs, kept in the stockyard prior to the killing? A. Sir?

Q. Were they housed in the stockyard prior to
159 killing? A. Yes, buy some farmer, then drove in there, and then they drive them to the killing pens, then they cool them off in a cooler, but you don't get them the same day they was killed, but next day get the pigs when they cooled off.

Q. Before they were sent in the slaughterhouse, were they housed in the pens on the property? A. On the stockyard property, yes.

The Court: Did the farmers carry them to the east side or the west side of the road?

The Witness: East side of the road, that is where the sale was.

The Court: All right.

By Mr. Denit:

Q. In 1929, you stopped having hogs slaughtered? A. Yes, I was buying already dressed after that, dressed meats.

Q. Was the abbattoir in operation in 1929? A. Yes, it was.

Q. How long after 1929? A. Operated until 1933?

Q. Until 1933? A. Yes.

Q. Even after the fire? A. Oh, yes, they had two, three fires, I believe.

160 Q. Didn't they have a fire in 1932? A. Could be, I don't remember, I know it was about two fires they had there.

Q. After the second fire, didn't they stop operating the abattoir? A. No, they was killing, yes, still killing, they repair things up, got the pens all built up and kept on operating.

Q. Even after 1932? A. Yes, they close up in 1933, I believe it was April, if I ain't mistaken, yes.

Q. You moved away from there when? A. Moved away in 1939 at the first of the year, in January.

Q. How long did the stockyards continue to operate after the abattoir stopped operating? A. They didn't operate any more after 1933, they did not operate no more. It was idle.

The Court: Did anybody use that lane from Benning Road after 1933?

The Witness: Yes, people used to go in there and carry, like junk out, you know, they was selling out you know, they had some old machinery in there and stuff they were selling out. They had to go in there and get it out, old fertilizer pens in the backyard, they were getting all that stuff out.

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161 Thereupon—**Fred W. Knudsen**, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wheatley, Jr.:

Q. Mr. Knudsen, please state your full name. A. Fred W. Knudsen, K-n-u-d-s-e-n.

Q. You are presently the Market Master at the Convention Hall Market, are you not? A. No, sir, I was, I have a business at market, 730 - 57th Avenue, Capitol Heights.

Q. Did you ever have occasion to be employed at the Auth or Loeffler plant in Benning Road? A. Yes, sir, I was employed at the Loeffler plant.

Q. The Loeffler plant, over what period of time? A. I went to work there in 1917 and stayed there until about 1929.

Q. And what was your position with the Loeffler plant? A. Well, I first went to work there as handyman and after three years, I was a superintendent.

Q. You were superintendent of the plant? A. That is right.

162 Q. Would you describe to His Honor the location where that plant was and the facilities that were available? A. Well, the plant was in Benning, just right alongside of the railroad track.

Q. Just east of the railroad track, was it not? A. East of the railroad track.

Q. What else was there? A. Well, the stockyards was there.

Q. All right. Where was the stockyard with respect to the location of the Loeffler plant? A. The stockyard was east of the Loeffler plant.

Q. And where was the office of the stockyard? A. The office of the stockyard was north of the Loeffler plant in a little building that sit out on a lot.

Q. Have you seen this plot plan, Mr. Knudsen? A. No, sir.

Q. Will you look at that, please?

Mr. Wheatley, Jr.: Your Honor please, that is the same as the exhibit Your Honor has before you, which we were using for orientation.

The Court: All right.

By Mr. Wheatley, Jr.:

Q. Will you look at the layout shown on that plot plan, Mr. Knudsen, and can you tell us from that the location of the various activities that were on the grounds?

163 A. Just what do you mean by the activities?

Q. The buildings and what their uses were. A. Well, this was the slaughterhouse back here.

Q. When you say "this" you mean in the rear of the property? A. Yes.

Q. That was the slaughterhouse? A. Slaughterhouse and then the cold storage plant.

Q. Start at Benning Road, Mr. Knudsen. A. That was the Loeffler plant at Benning Road.

Q. On Benning Road, itself, what was the office that was there? A. That was the stockyard office.

Q. Stockyard office, and that was within the vacant lot? A. That is right.

Q. What was right south of that? A. South of that was the Loeffler plant.

Q. The Loeffler plant? A. That is right.

Q. And what was in their offices? A. Well, we had an office and a garage and sausage factory.

Q. How was access gained to the garage and the sausage factory, from there into that? A. In our yard.

164 Q. In the yard? A. That is right.

Q. What was back of that building? A. There was the cold storage plant.

Q. How was access gained to the cold storage plant? A. Well, there was a platform here and there was a door here in the cold storage plant and there was a couple doors in our factory that went into the cold storage plant in the Loeffler factory.

Q. What was back of that? A. The killing floor was back of that.

Q. What was in back of that? A. The engine room was in back of that and the fertilizer plant was still further back.

Q. What was the most southern part of that property? A. I think the fertilizer plant.

Q. The fertilizer plant? A. That is right.

Q. What vehicular access was available to the fertilizer plant? A. There was a road that ran the east side of the building all the way back to the fertilizer plant.

Q. Where did that road run from? A. It came from Benning Road.

165 Q. From Benning Road? A. Yes, sir.

Q. Was that road used? A. It was used, yes, all the time.

Q. By whom? A. Well, it was used by Loeffler Company and by the Auth, Phillips, and, oh, anyone who had stuff killed there. They had to go back there to get their offal, offal is the stuff they couldn't hang on hooks like hearts and livers and anything like that.

The Court: That is in the abattoir?

The Witness: From the abattoir, yes, sir.

By Mr. Wheatley, Jr.:

Q. The access was along the roadway on the east side of the property, is that correct, sir? A. That is right.

Q. How was that road paved? A. Oh, I think it was cobblestones, best of my recollection.

Q. Was it used frequently or infrequently? A. Oh, it was used frequently.

Q. And by everybody having connections with the— A. Everyone who had slaughtering done there, they had to go to the killing floor to get their offal.

Q. That was the only way to go back there? A. It was the only way to get back there.

166 Q. Calling your attention to Exhibit 19-B, I ask you if that roadway you are speaking of is shown on that picture. A. Yes, sir.

Q. Where is it, Mr. Knudsen? A. It is sort of discontinued, it went out here to Benning Road.

Q. Now, Mr. Knudsen, was there also a road or right-of-way in front of the office? A. I don't know just what you mean.

Q. Was there a road between the stockyard office and your offices here? A. Yes.

Q. Where was that, will you show His Honor on the plat he has before him? A. That was this road here (indicating).

The Court: What was it?

The Witness: It wasn't called anything, it was a road and cattle drive and hog drive, we used to come up here

and go around here and go to the killing floor to get our offal.

The Court: Whose office was this?

The Witness: The stockyard's office.

The Court: It had nothing to do with this property?

The Witness: No, sir.

The Court: It was owned by other people?

The Witness: Yes, sir.

167 The Court: All right.

By Mr. Wheatley, Jr.:

Q. Was that road also used in connection with the business conducted on the abattoir property? A. Yes, sir.

Q. How long did you say that continued, over what period of time? A. All the time that I was there.

Q. And that, then, was what? A. 1917.

Q. To what? A. The latter part of 1929; oh, I think it continued after that, but then, that is when I left there, I took a selling job and didn't get out there very often any more.

Q. But it continued during the time you were working there? A. That is right.

* * * * *

168 Thereupon—**Harold L. Alexander**, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wheatley, Jr.:

Q. Tell the Court your name, please. A. My name is Harold L. Alexander.

Q. Where do you live? A. 4820 Hayes Street, Northeast.

Q. In Washington? A. Washington, D. C.

Q. How long have you lived here in Washington? A. Well, I been in Washington ever since 1919, I been in Northeast ever since 1920.

Q. Did you ever have occasion to be employed by anyone, which required your visiting or being on the premises of the Washington Abattoir? A. Well, I was employed at M. E. Horton.

Q. At where? A. At M. E. Horton Wholesale Grocers.

169 Q. What was your occupation? A. Driver.

Q. Over what period of time? A. For 25 years and 20 days.

Q. Beginning when? A. I began driving for Horton in 1923, I think it was.

Q. Did you have occasion, while you were so employed by Horton as a driver, to go to the abattoir property? A. I went to the Washington Laboratory several times for him, carrying cornmeal in there, and then I used to go there about once or twice a week for my mother to buy things.

Q. What did you buy there? A. Meats, fresh meats at the laboratory, you went in the sales department.

Q. Now, it is the abattoir that you are speaking of, isn't it? A. Well, that is the sales part of Keane and Loeffler's?

Q. That is right. Where was that place? A. That place was located at Minnesota Avenue and Benning Road, just the south side of the bridge.

Q. And with respect to the railroad tracks, where was it? A. The railroad tracks ran on the west side right near the building, they unloaded the cattle on the B. & O. Railroad on the west side.

Q. Now, do you remember any roads that were in
170 that area that were used? A. I do.

Q. What roadway did you use? A. Well, you had two roadways you could use, you could use the road that came in between the first building and the B. & O. Railroad, which is the lumber yards now, that led up to the sales office, it stopped there. And then, you could go east just a very short distance and you would see into the lane that you could go north or either south, which led down

between the cattle pen and the main plant, all the way down to the old fertilizer plant.

Q. Now, from the fertilizer plant out to the Benning Road, did the road go straight through? A. Well, I don't think it did, you had to come back because the farmers usually go down and get the fertilizer and come back the same road.

Q. Did the road run the full length of Benning Road to the fertilizer? A. It ran the full length from the bridge, you had to come over Benning Bridge and make a sharp right, right at the end of the bridge, and come down and then make another left and go down that lane.

* * * * *

171 Q. Mr. Alexander, now, when you spoke of the road that went alongside the property, one side of the property was the railroad track, is that right? A. One side was the railroad.

Q. Now, on the other side of the property, was there a roadway on the east side? A. On the east side of the buildings, that was a lane that ran between the plant and the cattle—

Q. That ran between the plant? A. And the cattle barns.

Q. And the cattle stalls? A. Cattle stalls, right.

Q. How far did that lane run? A. That ran all the way to the old fertilizer plant.

Q. Where did it start? A. It started right at the bridge,

* * * * *

172 Q. Didn't this roadway that ran alongside the buildings run into that road? A. That is right.

Q. Is that what you mean to say? A. That is right.

Q. Show His Honor on the sheet he has before him, * * *

* * * * *

173 The Witness: Yes, from Benning Road you make a right in here and then you follow the bridge back, you follow Benning Road back under the bridge, that would still be Benning Road under the bridge, you follow

174 it back a piece, then you make a left into this lane and you follow this lane right in between the cattle barns and the main plant, and that would lead you on out past the plant and to the old fertilizer plant, and the farmers used to haul their fertilizer out.

* * * * *

The Court: I know, but what year did you stop going in there?

The Witness: Well, I still goes in there at times now, because I haul for Mr. Cogito, we hauled all those stoves in there for him.

By Mr. Wheatley, Jr.:

Q. You mean from 1923, you said you had started? A. Well, going in with trucks, but around 1920 I went in there on Saturdays and during the week, buying meats for my mother.

Q. You went in during the week and on Saturdays from 1920, is that correct? A. That is correct.

Q. And you went in there driving trucks from about 1923? A. Right.

Q. Until how long? A. Up to the present time. We go in there at times, now, hauling range stoves and refrigerators.

* * * * *

175 Q. Show that to His Honor just like you showed it to me.

The Court: Where is the gate?

The Witness: The gate is just the other side of this building here, and you turn in to your right and after you turn in to your right, you run into what looks like a vacant lot, a space between the two buildings, and then you back down to your left.

* * * * *

176 Q. When you say you drive into Mr. Cogito's place now, you don't work for Mr. Cogito, do you? A. I drive for Powell's Transportation.

Q. What you do is drive trucks into the warehouse which is on his ground, is that correct? A. That is right.

Q. And that same road that you used back in 1920, you are still using now? A. Use the same road.

Q. How was that road paved when you first started to use it? A. Well, it used to have little old cobblestones, like, on it.

Q. How is it now? A. Well, in some spaces, it still have old cobblestones.

Mr. Wheatley, Jr.: Your witness.

Cross-Examination

By Mr. Denit:

Q. When was the last time you were on this property?

A. I was on this property, I guess, I can't give you exact dates, but I think it has been about three or four weeks, something like that, about four weeks, a month, four
177 or five weeks, something like that.

Q. On that occasion, were you delivering property to be put in the warehouse there? A. I think that I was picking up some stoves or Frigidaires to be carried out to the new construction work.

* * * * *

Q. Did you, on that occasion, go directly from the Cogito property to Minnesota Avenue?

* * * * *

A. When I came off of his property, I came out this gate, when I came out the gate to my left to the bridge, then to my right and then at the end of the bridge to my left back on Benning Road.

Q. You mean you used this old alleyway all the way down to Benning Road? A. All the way down, no other entrance unless you comes through the lumber yard.

Q. Isn't there access to the Cogito property over the parking lot and to Minnesota Avenue? A. No, sir,
178 because you would be running into somebody's car

who was parked, because there is no road that comes straight across.

Q. Isn't there a street that goes through there? A. No, sir, no street that goes through, there are cars parked all through there; at times you can hardly see the driveway because of cars parked all through there. I know, because that is where I do my marketing.

* * * * *

The Court: Is it your testimony that you still use this same entrance to the property from the Benning Road that you have always used?

The Witness: Always used from 20 years ago, 179 from the time that I begin to know it.

The Court: All right.

* * * * *

185 The Court: The Court understands it, sir. If plaintiff admits, in so far as the buildings there now are concerned, that every one can be reached with 186 this paved road, that is admitted, isn't it?

Mr. Wheatley, Jr.: That is correct.

The Court: What is the use talking about it?

Mr. Denit: I didn't know anything like that was admitted.

The Court: That is what I understood the plaintiff to say.

Mr. Wheatley, Jr.: They can all be reached.

* * * * *

Q. At the time you came to the sales office, the road was blocked from that point across, wasn't it? A. From this point here?

Q. Yes. A. This was a through entrance right up to the sales office and you could go in there and, after you went in, in a car, you could make a left and come right back out the road.

* * * * *

The Court: Gentlemen, we won't take any more testimony. Mr. Weis' car is parked right adjoining this building right out here, and he is going to take us out.

* * * * *

188

Washington, D. C.,
April 11, 1951.

* * * * *

190 Mr. Wheatley, Jr.: If Your Honor please, it looks like we may probably come to a close of the testimony today and we have in evidence, without objection from Mr. Denit, all the exhibits that were offered by the plaintiff with, I think, three exceptions. One was the plot which had been used for orientation purposes.

The Court: What is that?

Mr. Wheatley, Jr.: The plot plan, Exhibit B, which has been used for orientation purposes and that has been, by consent, for that purpose. Am I correct in that?

Mr. Denit: That is correct.

Mr. Wheatley, Jr.: And the other two exhibits offered, with the reservation, one was the Fire Insurance Underwriters' Plan which was introduced but the Court held it was subject to proof as to its relevancy here and, therefore, it hasn't been used in evidence; and the second one, as I recall it, was the photostat of the sketch in the District Building, in the Surveyor's Office, the A. and T. book, which I will ask a witness about in a minute.

Other than that, Mr. Denit has no objection to the exhibits and I just wanted to be sure that was the fact.

The Court: All right. Was there an objection to the Coast and Geodetic survey?

191 Mr. Wheatley, Jr.: I just asked the gentleman about that and he concedes that that is a Government record and, if he doesn't, well, then, I of course will bring back that witness I had here the other day, but I don't think Mr. Denit will deny that.

Mr. Denit: We raise no question about the authenticity of the document at all.

Mr. Wheatley, Jr.: I assume it will not be necessary for me to call the man from the Coast and Geodetic Survey.

The Court: That is correct.

192 Thereupon **Kenneth G. Fernald** was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

Q. Mr. Fernald, where do you work? A. District Surveyor's Office.

Q. What is your position? A. Assistant surveyor.

Q. I don't know how long you have been there, it has been a long time. A. Thirty-five years the 15th of August.

Q. You are the man in active charge of the office, is that right? A. Yes, sir.

Q. Mr. Fernald, I show you a paper which has been introduced in evidence and marked as Exhibit No. 13, and ask whether or not that is a survey issued by the Surveyor's

Office, the District of Columbia, with respect to Parcel 168/50? A. It is.

Q. What is the location of that property with respect to Benning Road and the B. & O. Railroad tracks?

A. Immediately south of Benning Road and east of the Metropolitan Branch of the B. & O. Railroad—Alexandria branch, I should have said.

Q. What is the size of the area covered by Parcel 168/50?

A. Well, it is approximately 368 feet on the Baltimore & Ohio Railroad right of way, the reason I say approximately is because there are two different bearings on that line, there is a break in the line. And on the southerly part of the parcel, it is 152 feet; on the easterly boundary, it is 359.90; and on the northerly boundary, it is 65 feet

and another distance of 13.57 feet, another one of 31.11, and then the parcel runs in a southerly direction 15.51 and in a westerly direction 36.34.

Q. For assessment, taxation, is that Parcel 168/50? A. I can't testify to that, sir.

Q. How is it designated on your records? A. At the time of the survey, 168/50.

Q. Does that Parcel 168/50 include any previous parcel numbers? A. Yes.

194 Q. What are they, sir? A. 168/5 and 168/6, and another one, I do not have the number of, on the northerly end of it.

* * * * *

Q. With respect to present Parcel 168/50, what portion of that was originally Parcel 168/6? A. The southerly 50 feet.

Q. By the full depth? A. Yes, sir.

Q. What portion of what is now Parcel 168/50 was originally Parcel 168/5? A. Well, there was a piece between 168/6 and the parcel which I do not have the number of, on the north. * * *

Q. Mr. Fernald, did you produce a book from your office known as the Assessment and Taxation Record? A. Yes, sir.

Q. May we see it, please?

Mr. Wheatley, Jr.: Your Honor please, Exhibit No. 12 is a photostat of this page 168, the Surveyor's office, of course will not testify from photostats and so the original exhibit, the book in the Surveyor's Office, is presented and we would like to have substituted for the discussion
195 as to the evidence, the photostat for the original, after the witness has been excused, if that is agreeable to counsel for the defendant.

Mr. Denit: No objection to that.

* * * * *

Q. Mr. Fernald, does Your Office have a record of Parcel 168/5 and 168/6 in the Assessment and Taxation Records? A. Yes, sir.

Q. What document is that that you have before you?
A. The present book.

Q. How do you identify that book by reference in your office? A. Assessment and Taxation, Plots No. 117 to 190.

Q. On what folio page does that reference to Parcel 168/5 and 168/6 appear? A. 168.

Q. And on what date was that document filed in your office? A. It was recorded 4 P. M., October 31, 1906.

Q. And that is part of the records of your office at this time? A. Yes, sir.

Q. Now, will you turn, please, to page No. 168 of that volume and show to His Honor where there is the 196 reference to Parcel 168/5 or 168/6? A. This piece here is 168/5, the other one is 168/6.

Q. Now, is that portion shown on the page before you a part of the property now known as Parcel 168/50? A. Yes, sir.

Q. And is included in the Exhibit No. 13 which was previously exhibited to you? A. Yes, sir.

Q. Will you show to the Court the part on Plaintiff's Exhibit No. 13 which includes Parcels 168/5 and 168/6 as shown in your old records of 1906? A. That corner and this corner here (indicating). This corner here is the intersection of those two lines, which that corner and that corner is a prolongation of that line over to here (indicating).

Q. The full width from the railroad track easterly on the southern line of Parcel 168/6 is what, Mr. Fernald? A. The full width through here?

Q. Yes, sir. A. Approximately 152 feet.

Q. On both the 1906 record and the 1943 record? A. Yes, sir.

Q. By the way, this survey plat, Exhibit No. 13, was what date, sir? A. This is January 14, 1943.

Q. 1943. And the northerly line of the Parcel 197 168/5 between the railroad tracks and the easterly line is what distance, approximately? A. Approximately 152 feet, * * *

Q. And the easterly line of Parcel 168/6 and the easterly line of 168/5, as shown in the 1906 record, is what?

* * * * *

A. The length is 50 feet and 283 feet.

* * * * *

Q. Is there shown on the 1906 record on the easterly line of Parcels 168/5 and 168/6 any reference to an alleyway or roadway on the easterly side? A. The word "Alley" is written alongside of it.

The Court: Where?

The Witness: Right here (indicating).

The Court: Where does that appear here, sir?

The Witness: That could be along in here, the word "Alley" would be in here.

The Court: I notice along the easterly line flagstone paving, flagstone paving out to Benning Road. What does that indicate, sir?

The Witness: That indicates there was flagstone paving in there.

The Court: You mean an alley or lane or something of that kind?

The Witness: Yes, sir, something over which you could drive.

The Court: And I notice at a point here, I don't know what the point would be, but I notice some dotted lines which go up to the easterly line of Parcel 168/50. What does that indicate, sir?

The Witness: Well, that there was an excavation, apparently, made in there and this is the top of the cut, in other words, this flagstone paving in here is not the same level as this ground over here (indicating). There has been something cut out of here and this is the top of the cut in there.

The Court: Is there any indication that the flagstone paving ceased at this point?

The Witness: I would say yes, sir, ceased along that edge along in there, in other words, the paving came approximately up to the edge of that cut, according to this map.

The Court: I see; and that was made in 1906?

The Witness: 1943.

By Mr. Wheatley, Jr.:

Q. No. 13 was made in 1943? A. That is right.

Q. And the exhibit of your record in 168 was made in 1906? A. Yes, but that didn't show all the information I have just given, I am testifying from a survey of 1943.

Mr. Wheatley, Jr.: Your Honor, a photostat of 199 that has been introduced and is shown as Exhibit No. 12.

The Court: Well, that has the word "Alley" on it.

The Witness: That is right,

* * * * *

By Mr. Wheatley, Jr.:

Q. That runs the full length of the Parcel 168/5? A. I can't answer that.

Q. It only has the word "Alley" in there? A. Yes, sir, the alley is not delineated on that map.

Q. Will you refer to another document in your office, which I think you referred to as document Y-65?

Mr. Wheatley, Jr.: Your Honor, this is Exhibit No. 12, which is a photostat of this exhibit, sir. May we substitute the photostat for the original book so that it may be returned to the Surveyor's Office, with reference to this area?

The Court: Counsel said he had no objection.

Mr. Denit: We have no objection.

Mr. Wheatley, Jr.: We offer in evidence the book and the photostat.

* * * * *

Q. Now, Mr. Fernald, you have produced a document identified in your office as Y-65, is that correct, 200 sir? A. Yes, sir.

Q. What is that document? A. It is an old map made back in 1907.

Q. Does it show there on the area now known as Parcel 168/50 or which was then known as 168/5 and 168/6? A. It shows 5 and 6, yes, sir.

Q. And that includes the same area that is now Parcel 168/50? A. Yes, thought 168/50 is not delineated on this map.

Q. But the property included in 168/50 is included in 5 and 6? A. That is right.

Q. Now, what date did you say that paper was filed in your office? A. 1907.

Q. 1907. What information is disclosed on the easterly side of the line on Parcel 168/5 and Parcel 168/6 as shown thereon? A. 168—

Q. First, point out to His Honor the area or boundaries of Parcels 168/5 and 168/6 as shown thereon. A. This is 5 and 6 in here, in other words, this is apparently identical, the parcels shown on here are the same as the one
201 shown in the book.

The Court: This last exhibit was made when?

The witness: 1907.

The Court: All right, sir.

The Witness: The Parcel 168/6 shows a frontage of 50 feet, this is on the easterly line of the parcel.

The Court: Shows what, 50 feet?

The Witness: Shows 50 feet on the easterly line of the parcel and it shows, Parcel 168/5 shows a distance of 283 or 284.9 feet by actual measurement on parcel 168/5. It also shows a bearing of north 39.21, east a distance of 334.90, has a note on there, fence and brick walls on the west side, alley accepted as lined.

The Court: Accepted as lined?

The Witness: Yes, sir.

The Court: What does that mean, sir?

The Witness: Well, it means that there was a brick wall and a fence along here and they accepted that as the line of this parcel.

The Court: I see.

By Mr. Wheatley, Jr.:

Q. Fence and brick wall, and there was an alley reference? A. It says fence and brick walls on west side of alley accepted as line.

Q. And that record has been in the Surveyor's Office since 1907? A. That is right.

Q. And the book record since 1906? A. That is right.

* * * * *

Q. Mr. Fernald, did you tell me Monday that you knew that road had been there since 1915? A. I told you I knew there was an entrance off Benning Road, a road leading into the stockyards and abattoir, leading off Benning Road, but I did not say I had ever been on it.

Q. How long have you known there was that entrance to the stockyards off of Benning Road? A. If I may say, I was in the field from 1916 to approximately 1922, and worked that territory and passed the stockyards lots of times going to and from various jobs out in that section.

Q. And where did that road go, so far as you saw it? A. It turned in off Benning Road.

* * * * *

The Court: The Court doesn't remember, has this 1906 map been offered in evidence?

By Mr. Wheatley, Jr.:

Q. That map you identified as Y-65, is that correct? A. Yes.

Mr. Wheatley, Jr.: We offer in evidence, if Your Honor please.

Mr. Denit: Is that a map of the Surveyor's Office?

The Witness: Yes, sir.

Mr. Denit: Made by the Surveyor's Office?

The Witness: Yes, sir.

Mr. Denit: No objection.

Mr. Wheatley, Jr.: And the photostat was substituted for the book, sir.

The Deputy Clerk: No. 23.

The Witness: Might I ask the Court, does that map have to be marked? I was going to say, if it does, if it is agreeable to counsel, I will furnish a portion of it in the discussion.

The Court: All right.

(Map Y-65, D. C. Surveyor's Office, was considered marked Plaintiff's Exhibit No. 23, and received in evidence, with photostat to be furnished by the witness.)

* * * * *

205 Cross-examination

By Mr. Denit:

206 Do you have any other map on file in the Surveyor's Office with respect to this property? A. I think there was one down there that showed what purported to show various sheds and alleyways, and so forth, on there, which was very old.

* * * * *

Redirect Examination

By Mr. Wheatley, Jr.:

Q. May I inquire when you found the other one, Mr. Fernald? A. I would say several weeks ago.

Q. After we had spent a little time with you? A. Well, I don't remember, I got the map out for somebody down there, I don't remember who it was, whether it was you or who it was.

Q. Is that older than the one you have in your hand? A. I can't answer that question, I don't have the date on it.

Q. We would be very happy to have you bring it in, too.

Mr. Wheatley, Jr.: Your Honor, please, as far as we are concerned, we would be glad to have Mr. Fernald excused

to go back to his office, then he can send down or come down with the old map.

207 When you find that other map, will you come back again with it?

The Witness: Yes.

* * * * *

Thereupon **Claiborne H. Mannar** was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wheatley, Jr.:

* * * * *

Q. Where are you employed? A. D. C. Surveyor's Office.

Q. And how long have you been employed there? A. Over 25 years.

Q. And were you in charge of field services from the Surveyor's Office? A. Yes, sir.

Q. I show you a paper which has been identified in this case as No. 13, and ask you whether or not that was prepared by you? A. The plat was not prepared by me, but I signed it.

208 Q. And did you assemble the datum from which the plat was prepared? A. Yes, sir.

Q. Did you make the survey? A. Yes, sir.

Q. Do you identify that as the result of a survey made by you? A. Yes, sir.

Q. Now, please tell us when that survey was made. A. It was made in 1943, this plat, I don't know the exact date, but in January, 1943.

Q. And what property does it cover? A. It covers Parcel 168/50.

Q. And where is that located in the District of Columbia? A. At the intersection of Benning Road and the Baltimore & Ohio Railroad Company.

Q. And with respect to Benning Road, on which side thereof? A. On the southerly.

Q. And with respect to Baltimore & Ohio Railroad tracks, which side thereof? A. Easterly.

Q. How far south of the Benning Road is the property located, Parcel 168-/50? A. Well, it starts, the description starts at Benning Road, the intersection of Benning Road and the Baltimore & Ohio Railroad Company right of way and it starts 81.64 southerly—

* * * * *

Q. Now, Mr. Mannar, would you put that map up on the bench so his Honor can see it and would you give, please, so that the Court can understand, the survey lines that you followed? A. This is the beginning point of the description—

Q. At Benning Road? A. It begins at Benning Road and comes South 43 degrees, 59 minutes, 30 seconds West.

* * * * *

A. * * * That is the beginning of the description. Then, it goes South 37 degrees 42 minutes East 36.34.
210 North 43 degrees 54 minutes East 15.51 feet.

Q. I show you a deed, Exhibit No. 2, which has a written description thereon. Would you see if that would help you in identifying the survey lines?

* * * * *

A. I was going South 44 degrees 01 minutes West, 81.64, and I had gotten this far: South 37 degrees 42 minutes East 36.34 feet. The actual measurement was 36.44 feet. Thence North 43 degrees 54 minutes East 15.51; then South 38 degrees 36 minutes East 31.11, actual measurement 31.19. Then South 76 degrees 43 minutes East 13.57, actual measurement 13.60. Then South 37 degrees 42 minutes East 65 feet, actual measurement 65.18. Then South 39 degrees 21 minutes West 359.90, actual measurement 360.38. Then North 50 degrees 39 minutes West 152 feet, actual measurement 152.50 to the said right of way of the

Alexandria Branch of the Baltimore & Ohio Railroad; then along said Easterly line of said right of way, North 39 degrees 22 minutes 30 seconds East, 50 feet is the measurement. Now, the description is North 39 degrees 21 minutes East 50 feet, then continuing along said
 211 line of said right of way North 41 degrees 03 minutes East 317.82. This is the description: the plat is North 41 degrees 13 minutes East 318.35, actual measurement. This was a description prior to this (indicating)

Q. Did you survey those lines, Mr. Mannar? A. Yes, sir.

Q. What did you find was on the extreme west side of Parcel 168/50 as you surveyed it? A. Well, there are numbers of buildings.

Q. What was the property on the west side? A. It was a building and an old wall.

* * * * *

A. And a board fence.

Q. With respect to the Baltimore & Ohio Railroad, did that adjoin? A. Yes.

Q. And did that adjoin on the whole west side of the line? A. The parcel itself adjoined but the buildings don't.

Q. The parcel adjoined the B. & O. Railroad right of way? A. Yes.

* * * * *

Q. On what side of the westerly line of Parcel
 212 168/50 was there a wall? A. At the northerly end, there was an old wall at the corner on the line and at the southerly end, the old wall is 3.05 back and the building is .7 back, that is on Parcel 168/50.

Q. Now, there are designated in the plat that you have before you, I think Exhibit No. 13, a number of red lines. What do those indicate, Mr. Mannar?

* * * * *

A. These hatched lines are buildings.

Q. Buildings, all right, sir. Did you find them as existing buildings at that time? A. Yes, sir.

Q. Was there any line to indicate walls which had supported but did not any longer support a building? A. That, I don't remember.

Q. You show a line as "Old Wall." What does that indicate? A. That indicates this was a survey to locate improvements and we don't always show the whole building. Now, this is an old wall and, for some reason, it is broken.

The Court: Let me ask, can counsel agree as to
213 the point on this plat where the plaintiff testified, that
the point indicated the north side of the building
which was the extent of his claim in so far as a right of way
is concerned?

Mr. Wheatley, Jr.: It is Parcel 168/6, if Your Honor please. It is the southerly 50 feet of what is now Parcel 168/50 and was Parcel 168/6, right there (indicating).

The Court: This is the point here?

Mr. Wheatley, Jr.: Yes, Your Honor.

The Court: Which is the extent of his claim?

Mr. Wheatley, Jr.: That is right, sir.

The Court: Maybe the witness can tell me, this indicates a flagstone paving up to about the point where this dotted line occurs; was there any paving beyond that?

The Witness: No, sir.

The Court: Was there any indication of an alley beyond that?

The Witness: No, sir.

Q. Mr. Mannar, over what area on the easterly side of the property line did you find flagstone paving or an indication of an alley?

* * * * *

A. Well, this flagstone paving began at Benning Road
and it was rather indefinite in here (indicating).
214 These lines indicate approximately the width, which
is about 18 feet.

Q. Yes, sir. A. But this area in here was dirt.

Q. You are speaking of Parcel 168/80? A. I am going down to 168/80 and then when you get down opposite 168/50, it looks like this was a paving and this flagstone paving is irregular in shape at that point.

Q. So that it runs from the south side of Benning Road southerly across the Parcel 168/80 and along the easterly side of Parcel 168/50? A. Yes, sir.

Q. For a distance of approximately one-half the full length of Parcel 168/50, is that correct, sir? A. Yes, sir.

Q. And the flagstone paving was indefinite except at the corner of Benning Road alongside of Parcel 168/80, but was well defined from the culvert and alongside of Parcel 168/50, is that correct? A. Yes.

Q. Did you find the culvert there? A. This culvert?

Q. Where is that culvert with respect to 168/50? A. It is approximately 10 feet below the northerly line.

Q. And does that carry vehicular traffic over a 215 water course? A. We drove over it.

Q. There is a water course under it? A. Yes.

Q. And does the alley lead into and lead from that culvert? A. Alley?

Q. The flagstone paving you were speaking of. A. The flagstone paving leads to the culvert.

Q. And passes from that? A. Yes.

Q. And alongside the easterly line of Parcel 168/50? A. Yes, sir.

Q. On the northerly line of Parcel 168/50, did you find any buildings? A. There is a building.

Q. Where is the building line shown? A. The building is one twenty back, both ends, at the easterly and the westerly ends.

* * * * *

217 Q. What do the curve lines in your survey over Parcel 168/80, proceeding westerly from the flagstone pavement, indicate? A. This indicates approximately the outline of the flagstone paving. This is what was physically visible, but after that it was covered with dirt.

218 Q. There is a line curving inward, curving westward, does that indicate that there was or was not any appearance of an alley or flagstones? A. These dotted lines are the outline of the flagstone paving that was visible.

Q. Yes, sir, and how far did they proceed, do you know?

The Court: In a westerly direction?

By Mr. Wheatley, Jr.:

Q. In a westerly direction. A. Oh, approximately 20 feet.

Q. Yes, sir, and was there any indication of the use of a driveway, roadway or alleyway in front of the buildings that existed on the north side of Parcel 168/50? A. No, because this was covered with dirt.

Q. With dirt? A. Yes, sir.

Mr. Wheatley, Jr.: Your witness.

Cross-examination

By Mr. Denit:

Q. Mr. Mannar, this survey was made for the Columbia Title Insurance Company? A. Yes, sir.

Q. And did the Title Company furnish your office with a description of the property? A. Yes.

219 Q. That is what is meant by "Description furnished" at the top of the plat? A. Beg your pardon, it is a copy, it was a description taken from the deed, I imagine.

Q. Do you recall whether or not any of the land was occupied at the time you went there for your survey? A. Yes, sir, it was occupied with the buildings.

Q. Any tenants in any of the buildings? A. I don't remember that. This has been eight years ago, I don't remember that.

* * * * *

Thereupon—**Roger Shumate** was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wheatley, Jr.:

* * * * *

220 Q. How are you employed? A. By the Government.

Q. The United States Government? A. Yes.

Q. And you are a meat inspector? A. Meat inspector.

Q. For the Department of Agriculture?

The Court: You are what?

The Witness: Meat inspector.

By Mr. Wheatley, Jr.:

Q. How long have you been employed by the Department of Agriculture as meat inspector? A. Thirty-three years.

Q. Did you ever have occasion to work at the Washington Abbatoir or Loeffler plant at Benning Road? A. Yes.

Q. Over what period of time? A. From 1918 to 1933.

Q. Did you have an office in the grounds there? A. Yes.

Q. Did you go there every day? A. Yes, every day.

Q. Every business day? A. Every day except Sunday.

221 Q. And what were your duties there? A. Well, it was to inspect all meats, see that it was sound, healthy and wholesome, fit for human consumption.

Q. Where was your office with respect to the buildings of the abbatoir property? A. My office was in the north part of the abbatoir.

Q. And did you have occasion to go throughout the grounds at the abbatoir? A. Oh, yes.

Q. Frequently? A. Yes.

Q. Would you describe to the Court, please, the roadways, rights of way that were used in connection with the facilities of the abbatoir property? A. It was on the east side of the abbatoir, there was a roadway that led all the way from the end of the bridge up into the yards and through to the fertilizer factory; it was in the south end of the abbatoir.

Q. When you say the end of the bridge, you mean the Benning Road bridge? A. Benning Road, yes. There was a road came right around the end of that bridge and went all the way by the building up as far as the fertilizer factory and it was on the south end of the abbatoir.

Q. Now, His Honor has before him a plat which
222 has been identified for orientation purposes in this case.

The Court: I would like to know the location of the fertilizer factory.

The Witness: It was on the south end of the abbatoir.

The Court: And that is as far as the alley went, as far as you know?

The Witness: That is as far as it went, that was as far as the wagons had to go, I mean that was as far as anyone had to go to get anything, you see, they sold fertilizer up in there to the farmers, Prince Georges County, Montgomery County, also Fairfax and Arlington, would come in there and buy fertilizer.

* * * * *

By Mr. Wheatley, Jr.:

Q. Mr. Shumate, look at this plat, the Benning Road is in this area, the fertilizer plant was back in this direction, is that right? A. That is right.

Q. Will you show His Honor where that roadway comes from Benning Road back to the fertilizer plant? A. This is the Benning Road here (indicating).

The Court: Yes.

The Witness: And there is a bridge now, right here, and coming around here to this, seems like it ought to be the roadway right here.

223 The Court: Yes.

The Witness: This is the abbatoir building in here.

The Court: That says "Abbatoir" right there. Where would the fertilizer factory be?

The Witness: The fertilizer factory would be down here on this end.

The Court: Does that include the plaintiff's claim?

Mr. Wheatley, Jr.: Yes, Your Honor. The fertilizer factory was at the south end of this property.

The Court: All right.

The Witness: And this road came right down here and come up this alley right through here, and the Auth Provision Company, the Phillips Company, used to use this road to come out and get the offal, and so forth, that was killed in the abbatoir and bring it back down Southwest.

The Court: How long were you out there, how many years?

The Witness: I would say from 1918 to 1933 would be about 15 years.

The Court: From 1918 to 1933?

The Witness: Yes, sir.

The Court: All right.

The Witness: And this alley went up through here and people would use it up to here to go get their fertilizer. There wasn't no use going any farther, but I think there was on this side some stock pens, along on this side, 224 but the alleyway ran right up in here and it stopped at the fertilizer factory, go up in there and turn around, load with fertilizer, and come on out.

The Court: It was used the entire time you were there?

The Witness: Yes, sir.

By Mr. Wheatley, Jr.:

Q. Where was your office with respect to this plant? A. My office was in this northern part here.

Q. You had access to all the buildings? A. Had access, see, I'd have to sometime seal this condemned tank on this, break and seal the condemned tank for the old stuff, see.

* * * * *

Mr. Wheatley, Jr.: * * * Did I understand you to say you still are employed by the Government?

The Witness: Yes.

Mr. Wheatley, Jr.: In the Department of Agriculture?

The Witness: Yes, still a meat inspector.

* * * * *

225 Thereupon—**Stefan Noll** was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

* * * * *

Q. And what is your present occupation? A. I do building for myself.

Q. Were you ever employed at the place on Benning Road known as the Washington Abbatoir or for the Loeffler Company or the Auth Company there? A. Yes, I work there 1921 to 1928.

Q. For whom did you work? A. Loeffler's.

Q. And at what place or location was that? A. It was in the front where they were making the sausage and stuff like that.

226 Q. And that was from 1921 to 1928? A. Correct.

Q. Is that correct, sir? A. Correct.

Q. What was your position there? A. Well, I worked on the meat bench and often I was doing the carpenter work and brickwork, whatever comes along.

Q. Maintenance, carpenter work? A. Yes.

Q. Did you know or have occasion to see a roadway or alleyway that ran alongside the east side of that property? A. Yes, that is right.

Q. Tell His Honor where that road ran from and to. A. Well, a road comes in from Minnesota Avenue and then it goes on back there where they was having the livestock up, and trucks went up there and that is about all I know.

Q. The road you are speaking of that came off Minnesota Avenue, is that Benning Road you are speaking of? A. Yes, Benning Road.

Q. That roadway goes directly back from Benning Road. Do they go back alongside to the fertilizer plant? A. Yes.

Q. Now, His Honor has before him a plat for orientation purposes and I show this to you, Mr. Noll, did the road run

from Benning Road, at this area, to the fertilizer
227 plant back here? A. That is right.

Q. Will you point out to His Honor on his plat where that was? A. This road here went on back to here, see, that is where they was having livestock in, that would go back here to the abbatoir.

Q. How much further back did it go? A. It went back a good ways here, the dressingroom was here, there is a dressingroom, I think that is as far as it went, sir.

The Court: Where was the fertilizer factory?

The Witness: In the back here.

The Court: Did it go back to the fertilizer factory?

The Witness: Yes.

The Court: All right, thank you, sir.

By Mr. Wheatley, Jr.:

Q. Was that roadway, in use, Mr. Noll? A. Yes, it was always in use.

Q. And by whom? A. Well, everyone who went in there.

Q. Everyone who went in there? A. Yes, sir.

Q. You mean wagons, Mr. Noll? A. Yes, wagons, trucks, anything went in there.

228 Q. Wagons and trucks? A. Yes, whatever have to go up there that went in.

* * * * *

Thereupon—**Arthur S. Cudmore** was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. Your present employment? A. Well, we are winding up our business, I am still out trying to collect money on some of the bills owed to us. We sold our business on September 30.

Q. Who is "we"? A. That is Auth-Loeffler Company.

Q. How long have you been employed by that company?
229 A. Auth-Loeffler, well, we started operating in 1931.

Q. 1931? A. That was Auth-Loeffler, yes, sir.

Q. Did you ever have occasion to work or be employed at the plant at Benning Road? A. Out at Benning, yes, sir.

Q. For whom did you work there? A. The Loeffler Provision Company.

Q. Over what period of time? A. Approximately eight years, from 1922 to 1930.

Q. From 1922 to 1930? A. Around about eight years, approximately eight years.

Q. What was your position there? A. Office manager.

Q. And where was your office actually located? A. Well, it was on the second floor of the main Loeffler plant.

Q. Now, with respect to the property at Benning Road, would you tell His Honor just where the main Loeffler plant was? A. Well, of course, one time there we used to cut right across the railroad tracks; after the Benning Bridge was put there, we made that right turn and come on down the old Benning Road and turned left into the yards there and that is our office right by the steps, second floor.

230 Q. And was that building adjoining the Union Stockyards property? A. Yes, it was adjoining to the Union Stockyards, yes, sir.

Q. Do you remember where the office of the Union Stockyards was, between Benning Road and the plant? A. The office was centrally located in front of the stockyard pens, the hog pens.

Q. Was that between the Loeffler plant and Benning Road? A. That is right.

Q. And the first building back of Benning Road, so far as the Loeffler plant was concerned, was the Loeffler office building? A. Yes, sir, and plant.

Q. And can you progressively tell us what buildings went southerly from the office building? A. Went Southerly, Washington Abbatoir.

Q. What was back of the Abbatoir?

* * * * *

A. Well, of course, they had their storage rooms, engine-room, fertilizer house, and of course further on back were the pens.

Q. Now, can you tell us, please, what was on the
231 west side of the property?

* * * * *

A. West side was a railroad.

Q. What was on the east side of the property? A. Well, they had kind of a lane running up to the east side of the property.

Q. And how far back did that go? A. Well, it would go up all the way to the fertilizer house and, of course, people coming in buy the fertilizer and that stuff.

Q. Did that run from the Benning Road end to the fertilizer plant? A. That is right.

Q. You say that was used? A. Yes, it was used.

Q. How was it used? A. Well, they were used by practically all the people that slaughtered cattle there, they would go there and get their offal products at that lane, and then, of course, it was used by anybody coming in there for fertilizer or running in there for manure, they would run the cattle up the lane there, of course, they would run the hogs up the lane, too.

Q. Mr. Cudmore, I show you a plat plan which is similar to the one His Honor has before him, which has been
232 used for orientation purposes only. Can you show to the Court on there the road you say ran from Benning Road back to the fertilizer plant, is that the road, sir?
A. Yes.

Q. Now, His Honor has one on the bench. Will you show it to him on his copy? A. (The witness indicated as requested.)

Q. Where was the fertilizer plant? A. The fertilizer is approximately back in here, sir, come on up to the abbatoir here, it was the last place back, right back in here (indicating).

Q. The office building you were located in, was where, Mr. Cudmore? A. Right here, this is the Loeffler plant.

Q. What was in the building on the corner, the northeast corner there? A. Is this northeast, or here?

Q. This building, Mr. Cudmore (indicating). A. That is part of our old, you know, the Loeffler sausage plant, and down here, of course, at one time they had to unload trucks from there and load them up.

Q. How did they load and unload those trucks, what roadway did you use? A. Well, we could use two roads, we could use that road or come around and use that one (indicating).

233 Q. Which road are you speaking of? A. I say you could use this road here or you could use this paved road here, that is marked paved here, because later on the abbatoir used this and the platform, the trucks come on up there, the hogs and cattle, and so forth here (indicating).

The Court: What, if any, way was there to get from the western paved road to the alley that we are talking about, if there was a way?

The Witness: Yes, you could cut—you see this little, well, whatever you want to call it, a little lane or something, see, when the hogs and all come off the trains, they would come on up and they would run around through here, and then, of course, they would go over to the cattle pens and so forth, hogs, these are the hog pens; then, of course, this place here at one time used to do a little loading of the Loeffler goods, say manufactured goods, and then come on out there.

By Mr. Wheatley, Jr.:

Q. Now, you have identified a roadway or passageway between the area marked paved road on the western side of the property and the alleyway marked on the eastern side, is that correct? A. Yes.

Q. Did that roadway or passageway run between those roads just north of the side of the Loeffler buildings? A.

North side, that is right.

234 Q. Between the Loeffler building and the stockyard office? A. Yes, you say—I would like to make myself plain, you wouldn't say it was an actual roadway, but I just say it was used by such, by loading here and unloading, and then, of course, the cattle and hogs and all coming around over the railroad.

Q. Was there a door into this building from this roadway? A. We had a door into this building, if I remember correctly, I think it was maybe three or four doors and then, of course, later on it was closed.

Q. Later on, that was used for your trucks? A. Yes, sir. Mr. Wheatley, Jr.: You may examine.

Cross-Examination

By Mr. Denit:

Q. When you left that area in 1930, Mr. Cudmore, was the abbatoir still in operation? A. The abbatoir was operating, yes, sir.

Q. By whom? A. That was the Gobel Company who bought the abbatoir and the Loeffler Company out, and also the Keane Company.

Q. Do you know how long Gobel continued to operate?

A. Gobel operated from 1928 to approximately 1933.

235 Q. Now, the exact date, I wouldn't remember, but approximately 1933, round about five years.

Q. Was it approximately after the fire occurred that Gobel ceased to operate there? A. Well, I really couldn't say, because I know there was some contention which came up about the slaughtering permit, or something, but I am not familiar with that.

Q. You referred to a passageway on the north side of the Loeffler Building. Were there other passageways similar to that throughout the stockyards? A. You mean coming out from the Loeffler?

Q. Other passageways similar to that, where cattle were driven? A. I would say farther up there were passages, but you know cattle had to be driven in along that roadway and then to the Abbatoir Company, that was one inlet for the cattle and, of course, the hogs went up the chute and then, of course, anything that was brought in by trucks, like going around to the engineroom, you could get in and out there and also in and out to the fertilizer.

Q. As a matter of fact, there were passageways to all of the pens, were there not? A. Well, there were gates to the pens, you could call them.

Q. Well, weren't there passageways off of this lane
236 to the hog pens, the cattle pens, and the sheep pens?

A. Well, yes, those gates were right off of the roadway there.

Q. And were those passageways similar to the alleyway that you described on the east side of the property? A. Well, no, I would say no, because you don't do that, because you could take the—see, the pen gates, they had been all, say, more or less, three or four, you know, wooden gate affair, you could open up and let your cattle in or out, where the other was more or less not an opening but there, they could go right in there as to loading fertilizer or do anything like that, but as to the cattle or anything like that going into the abbatoir, that would also be a gate where the cattle could go through.

Q. Where was that gate located? A. Well, it would go right into what they call the knocking pens of the abbatoir company, that would be on the first floor of the abbatoir, that would be what they call the knocking pens where they go in and slaughter the cattle.

Q. Do you know whether or not the stockyards continued to operate after Gobel ceased operation there as an abbatoir? A. Well, I couldn't answer that because I was away from there.

Mr. Denit: That is all.

By Mr. Wheatley, Jr.:

237 Q. Mr. Cudmore, during the time you were there, there were how many plants operating along that alleyway, was the Loeffler Company there? A. Well, the Loeffler Company was there and, of course, as I say, the abbatoir and the Keane Company, of course, and the Loeffler Company were the owners of the abbatoir on a 50-50 stock proposition.

Q. So that there was the Keane and Loeffler Companies and the abbatoir, and did Auth operate there, too? A. Well, Auth done their slaughtering there at one time.

Q. Auth did the slaughtering? A. At one time, they were interested; later on, they weren't.

* * * * *

238 Thereupon—**Claiborne H. Manner** was recalled as a witness by the plaintiff and, having been first duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Wheatley, Jr.:

Q. You testified just a few minutes ago and were sworn at that time. You may be seated, please. You were asked, Mr. Mannar, with respect to Exhibit No. 13, as to the flagstone paving on the east side of Parcel 168/50. What did you find, Mr. Mannar, with respect to the area alongside of the eastern line of that parcel southerly from where you have indicated the flagstone paving was; would you show His Honor, please? A. This is the top of the cut, this area was graded and the flagstone paving ended there, and then this was dirt around here and this is the flagstone paving, and this flagstone paving is three or four feet higher than the surrounding territory.

Q. And was the same thing true of the area back southerly from that flagstone paving? A. Yes, this has been graded.

The Court: Did the alley continue beyond that point in a southerly direction?

239 The Witness: Well, at the time were there, the flagstone paving would end at the top of this cut.

The Court: I see.

The Witness: There was an indication, it looks as though it had gone through, but I couldn't say that because this was dirt, it had been graded, three or four feet lower.

The Court: Yes, sir.

By Mr. Wheatley, Jr.:

Q. But the area easterly of the flagstone paving had been graded lower than the flagstone paving? A. Yes, sir.

Q. So the area shown on your chart as flagstone paving was a raised roadway over the—— A. Surrounding territory.

Q. That was true to the southerly end of that parcel? A. Yes, sir.

Mr. Wheatley, Jr.: That is all.

* * * * *

Thereupon—**John F. Kelle** was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

240 Q. And where do you live? A. 5002 Arkansas Avenue.

Q. You are now retired, is that correct? A. Yes, due to an illness I was forced to retire.

Q. How long have you been retired, sir? A. Oh, about three years, four years.

Q. Mr. Kelle, keep your voice up so His Honor can hear you. Did you ever have occasion to work in the vicinity of the Union Stockyards or Washington Abbatoir? A. I was employed by the Washington Abbatoir Company from 1907 to 1910 as a bookkeeper.

Q. That was 1907? A. '07 to '10.

Q. By the Washington Abbatoir Company? A. Washington Abbatoir Company, yes, sir.

Q. Where was your office located then? A. Well, now, this lane from the main road runs from north to south, doesn't it?

Q. Yes. A. There is a little bridge there, a little creek there.

* * * * *

A. A culvert, pass that, you pass the building, the
241 abbatoir building and there is a separate building facing, a two-story building; the first floor was used as a dressing room for the men and the second floor was our office.

Q. And that is where you were actually working? A. That is where I actually worked for those years.

Q. Now, Mr. Kelle, coming from Benning Road down this roadway that you spoke of, that went along the east side of the abbatoir property, didn't it? A. That is correct, east side of the abbatoir.

Q. Where was the stockyard office? A. The stockyard office, oh, I would say—

Q. Was that up near the Benning Road? A. Yes, this was the office here (indicating).

Q. Now, Mr. Kelle, you worked for the abbatoir? A. That is correct.

Q. That was in 1907? A. To '10, that is right.

Q. Then you went to work for whom? A. Then I worked for Auth Provision Company?

Q. How long did you work for Auth Provision Company?

A. Oh, I think fourteen years.

Q. Where was your office then? A. That was downtown.

Q. Downtown? A. Yes, I didn't come in contact with the place here.

242 Q. Did you go back to the abbatoir property?

A. No—yes, then, I became a manager for the Union Stockyards Company in 1924 and I was their manager until 1937.

Q. From 1924 to 1937 for the Union Stockyards Company? A. Yes.

Q. Now, show His Honor on the plat he has there, the area where the stockyards office was and where your office was. A. Your Honor, this is the stockyard there, this was the hog pen—well, this here is our stockyard office, this was a hog pen, this is the hog—we called it lane, and this was our pigpen and up here our cattle pens.

Q. Where was the fertilizer plant? A. The fertilizer plant, this is the abbatoir, there was an entry in here, there was a fertilizer plant here.

Q. Where was your office when you worked the first time? A. Facing this road there, the office building.

Q. Is that road the one you used going back and forth to work? A. Yes.

Q. Now, what other roads were used in connection with that property? A. What other roads?

Q. Yes. A. Oh, you could go through here, this
243 road here, this building wasn't there at the time, that is the Loeffler plant, I think that was put up there in 1914 or 1915. At that time, there was a loading platform all the way across, before they built this plant here for Loeffler. Then, if you wanted to get into the abbatoir, there was several doors here, you had to go through the cold storage process to get into the other part.

Q. What road did you use? A. They used this road (indicating).

Q. Over what period of time? A. All the time I was there.

Q. What was it used by? A. Well, for the men to go to work, and there was a lot of fertilizer sold at that time, farmers came there with their trucks, with their teams, and on hog killing days there was quite a procession there of colored people buying chitlins and stuff of that type, came up there with baby carriages even, sometimes twenty or thirty on hog killing days. That road was used continuously.

The Court: You are familiar with it from 1907 to 1910, and 1924 to 1937?

The Witness: That is correct, Your Honor.

By Mr. Wheatley, Jr.:

Q. You had occasion to go back there between 1910 and 1924, did you not? A. No, I did not.

244 Q. You did not, all right. Your witness, Mr. Denit.

Cross-examination

By Mr. Denit:

Q. Mr. Kelle, do you know when the abbatoir ceased to operate? A. When did they have this fire, I think it must have been around 1933 or 1934, I am not quite sure now.

Q. After the abbatoir ceased to operate, did the Union Stockyards continue to operate? A. We continued because we were under the impression that the Gobel people would get their permit to rebuild; then, when they did not get the permit, of course, there was no use for us continuing the yards.

Q. After the abbatoir ceased operation and while the stockyard was being operated, who used this lane? A. Nobody used the lane, only for us, we kept on buying little stuff there, like hogs and so forth, and we used the lane up to this culvert. There was a kind of loading or unloading platform there for the farmers to unload their hogs or calves, whatever it was.

Q. So, then, it would be fair to say the only people who used the lane were people doing business with the stockyard?

A. At that time, yes, because nobody else had any
245 occasion to go up there.

The Court: That is between 1933 and 1937, is that what you are talking about?

The Witness: Yes, I think it was 1933, Your Honor, when they had this fire, I am not quite sure.

The Court: As the Court understands, the abbatoir property and the fertilizer property used this lane up until the time of the fire?

The Witness: That is correct.

The Court: After that, it was only used in connection with the stockyards, is that right?

The Witness: Yes, Your Honor, but we didn't have any occasion to go all the way up there, we stopped buying cattle, we only bought small stuff, that is hogs and calves, and where this culvert is to the east—I mean to the east of it, there is a loading platform there, the farmers back their trucks against the platform and unloaded the stuff, and we drove it back into the hog pens. There was no occasion to go all the way up the lane; way up the lane, were nothing but cattle pens.

The Court: I see, all right.

By Mr. Denit:

Q. As far as you know, was the upper portion of the lane used by anybody after the abbatoir ceased operating?

A. Not during my time. See, I was there until 1937, what went on after that, I don't know.

246 Q. Now, between 1924 and 1937, while you were working for the Union Stockyard Company, was that lane required to be cleaned from time to time? A. Our men, they swept up once in a while, put the hose over it, yes, that was up to us to keep it clean.

Q. That was done by the stockyard men? A. By the stockyard company help, yes.

Q. Under your direction? A. Yes, they had orders, I would say once a month, to put the hose over it and sweep it up.

Mr. Denit: That is all.

Redirect Examination

By Mr. Wheatley, Jr.:

Q. Were you out there at the time of the fire? A. When the fire was?

Q. Yes. A. I was there, yes, I was even there that night, they called me up.

Q. The date of the fire was June 7, 1934, wasn't it, the \$125,000 fire loss? A. I can't recall just when it was.

Q. You can't recall the date. That is the fire you were speaking of when there was a \$125,000 damage? A. I don't know the damage, but that is the fire, the last they had out there, it was owned by the Gobel people, that is
247 correct.

Q. Owned by Gobel and they stopped the operation. Now, after that time, they used the road to go up and take the equipment out? A. That was after my time, that stuff was sold after I left there in 1937.

Q. You remember when the McCoy Circus came out there, when the circus was stranded? A. Yes.

Q. The road was used then, wasn't it? A. It has been quite a few years ago, I can't recall that.

Q. That is right—— A. But that was quite a few years ago, but they certainly didn't go over that lane.

Q. Didn't go over the lane? A. No, they must have come that Anacostia Road.

Q. I see. Well, now, what was the road from Anacostia Road, Mr. Kelle, where was the road from Anacostia Road, how did that come down? A. There was no road there, they just broke down the fence, gave them permission to break down the fence and unload the circus there.

Q. The condition you spoke of, the use of the road, was the period you were there, 1907 to 1910, and then from
248 1924, was it? A. To 1937, that is right.

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Thereupon—**Louis R. Kengla** was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

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Q. And your address? A. 5607 Ridgefield Road, Bethesda, Maryland.

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Q. What is your occupation? A. I am a manufacturers' agent.

Q. Where is your office address? A. 118 Q Street. Northeast.

249 Q. Were you employed at any time by either the Union Stockyards or the Gobel Company? A. By both.

Q. By both? A. Yes.

Q. And in connection with the property adjacent to Benning Road and the railroad tracks? A. Yes.

Q. What period of time was that? A. I started there in May, 1937, until the yards were closed by the Government.

Q. How long did that continue? A. About three and one-half years.

Q. And by whom were you employed? A. I was employed by the Union Stockyard Company and the Adolf Gobel Company of New York.

Q. You followed, in time, Mr. Kelle's employment? A. That is correct.

Q. Now, you said that you stayed for three and one-half years until the Government did something, was was it? A. Discontinued the operation there of the buying of livestock.

The Court: And between what years were you there, sir?

The Witness: 1937 to 1940.

By Mr. Wheatley, Jr.:

250 Q. Now, Mr. Kengla, do you recall the roadway that went along the east side of the Gobel property or the abbatoir property, from Benning Road? A. The east side would be the long roadway that ran way up to the back pens, holding pens?

Q. That is correct, sir. Do you recall that roadway? A. Oh, yes.

Q. Would you describe to His Honor what that road was, how long, where it ran from and to? A. Well, it ran from the overpass there.

Q. Overpass, you mean the Benning Viaduct? A. Benning Viaduct.

Q. At Benning Road? A. Yes, at Benning Road up to the back holding pens, which was approximately three or four hundred feet, I wouldn't know exactly, and it was made of cobblestones.

Q. Did it run back to the fertilizer plant? A. That is right.

Q. You know where it was? A. I knew where it was, it was never in operation during my time, though, see.

Q. What use of the road was made that you know of, during the period of time that you were there? A. Well, the Gobel Company had a man come in once a week to run the motors to keep them in condition, in the old plant, 251 and in addition to that, Tim McCoy's circus went broke here in Washington during that period and we used the holding pens by a court order for the animals and the roadway was used for ten days during that period to move the animals, feed, and anything else we had to get up to take care of them by. During my period there, the roadway had no main use, nothing else was hardly used around there.

Q. Was there any use in connection with removal of equipment from the Gobel establishment? A. Yes, the Gobel Company asked me to sell out all the metal, pipe, fixtures and everything, from the plant and I sold it to the Smith Company next door there across the railroad track, and they used their trucks to back in over those roads and remove all the pipes and whatever they bought.

Q. That was all taken over this roadway you are speaking of? A. Well, no, not all taken over, there was a road on the north side which connected that east road what we are speaking of, and they would back the truck into that particular doorway there and let most of the equipment down through the elevator shaft.

Q. But the roadway that we spoke of that ran from Benning Road along the entire east side of the property was

used in connection with removal of equipment from the Gobel plant, is that correct? A. Very little, most of
252 it came out that other door; yes, they did use it, however.

Q. And the roadway was used by this man you said came once a week for taking care of the machinery, is that correct? A. Correct.

Q. Now, have you described or mentioned this agreement with the Government relative to continued operation of the plant? What was your connection with that matter, Mr. Kengla? A. Well, I was there as manager of the yards, which included continuous operation with the contract they had with Gobel Company.

Q. What was that contract? A. It was to keep the buying and selling of live stock active so the Government wouldn't take the permit away from us.

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Q. And was the plant reopened? A. The plant was never reopened.

Q. And to whom was it sold? A. When was it sold?

Q. To whom, is that the plant that was sold to Mr. Cogito?

A. I assume, I wasn't active in the sale of the plant,
253 just the interior of the plant, the fixtures, I sold that out, I had nothing to do with the selling of the plant.

Q. Your connection with the plant continued up until the middle of 1940, is that correct?

A. That is roughly right.

* * * * *

Thereupon—**Robert Borrowman** was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. Where do you live? A. 1124 South Thomas Street, Arlington, Virginia.

Q. Where is your office? A. 412 Woodward Building, Washington.

Q. What is your business? A. Insurance.

254 Q. Have you had occasion to be on the premises known as the Union Stockyards or the Washington Abbatoir of the Gobel plant, at any time, during the business of those places? A. Somewhere, I don't remember the exact year, 1931 or 1932, about a year, a year and a half after I came to Washington, trying to sell them insurance.

Q. Who was that you tried to sell insurance to? A. The Gobel Company, I don't remember the man's name.

Q. And did you sell them insurance? A. No, sir.

Q. Did you have occasion to go back there at all? A. I made three trips, as far as I can recall.

Q. And over what period of time was that? A. About a year.

Q. Did you later have occasion to go back to the same property? A. I was back about 1945.

Q. And what was your purpose then? A. To make a survey to write insurance for the present owners.

Q. For the present owners? A. Yes, sir.

Q. And that is Mr. Cogito? A. Yes, sir.

255 Q. Now, the property that you saw in, I think you said 1931, is that right? A. I don't remember whether it was in 1931 or 1932, but back there some time.

Q. —Is the same property on which you later wrote insurance for Mr. Cogito? A. Some of the buildings were not there that were originally there.

Q. What changes were there? A. There was a space in there between the new buildings and what I remember of the old place, where the office was.

Q. Where are you speaking of, what buildings are down that were there then? A. I think there was a building between what is now the lumber yard and where Mr. Cogito has his warehouse?

O. There is a vacant space there now? A. Yes.

Q. What was there before? A. As I recall, the office of the stockyards was right in that section.

Q. Now, with respect to roadways, Mr. Borrowman, do you recall any passageways, alleys, roadways on the east side of the property? A. There is one along, let's see, the east side is Minnesota Avenue?

Q. That is right, sir. A. Yes, sir, as I recall, I
256 drove down there to get to the office.

Q. And from what did you come into that road?
A. Across the old bridge there over the railroad tracks.

Q. The Benning Viaduct? A. Yes, made a sharp turn around and came back in there.

Q. Off of Benning Road? A. Off of Benning Road and turned back along the viaduct to get back into the office, then you made another left turn and came back alongside the place.

Q. You came straight back alongside Benning Road to the property, is that correct? A. Yes.

Q. That was the condition in 1931, when you were there?
A. That is my recollection that was the condition as I was out there.

Q. Were you familiar with the roadway alongside the east side of the plant now? A. Been there frequently in the last three years.

Q. Is that the same roadway now as the one you spoke of? A. I would say yes.

Q. Mr. Borrowman, I show you a plan that has been identified for orientation purposes in this case, His Honor has one on the bench, with Benning road running from this
257 area and the roadway I have been speaking of running along this direction. Is that the roadway you speak of? A. That is my recollection, yes, sir.

Q. Would you show that to His Honor on the plan he has before him, please? A. As I recall it, it curves down along here and comes back in here and the office was right in here. There was a yard and little building in here, and the office was right up in this section here, as best as I can recall it. How far back this road goes, I don't know, because I only come as far as the office.

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258 Thereupon—**George P. Smith** was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

* * * * * *

259 Q. And how are you employed, sir? A. District Water Division.

 Q. And how long have you been so employed? A. Twenty-six years next month.

 Q. In your office, do you have the records in connection with the water connections to sewers, fire hydrants, and so forth? A. We have a record of water connections, yes sir.

 Q. Water connections? A. Yes, sir.

 Q. Do you have a record in your office of the connection of the fire hydrant on the east side of the old abbatoir property from Minnesota Avenue showing its connection or its disconnection? A. Yes, sir, I will answer it this way—

 Q. What do your records show, sir? A. I have a record where original connection was made to the stockyard November 6, 1911.

 Q. In 1911? A. Yes, sir.

 Q. When was that discontinued? A. That was discontinued 11/23/45.

 Q. And that was a connection where, Mr. Smith? A. Across Minnesota Avenue.

260 Q. Into the stockyard's property? A. Presumably, yes.

 Q. And it was discontinued by whose order. A. It was discontinued due to construction conditions at the time we were laying main on the west side of Minnesota Avenue.

 Q. And was a request received from anyone in connection with the property ownership for the discontinuance of that water connection? A. No, sir.

* * * * * *

 Q. Did your record show where the connection was made, Mr. Smith? A. Yes, sir, this was the old connection right here, this 6-inch, and when we were coming down this side,

we intended to hook it up here and we looked for it and couldn't find it. I presume that this large sewer must have in some way broke it, or it wasn't there, but
 261 we had intended to hook it here to the new main, but due to the fact we couldn't locate it, we had to come back and close it on this side.

Q. Mr. Smith, on which side of Minnesota Avenue was that connection? A. On the east side.

Q. On the east or west side of Minnesota Avenue? A. The connection was on the east side.

Q. And did the connection run under or through to the west side? A. Yes, sir.

Q. To the west side of Minnesota Avenue? A. Correct, sir.

Q. Where did it end, so far as the District records are concerned? A. I would say at the old building line.

Q. Of what property? A. The west side of Minnesota Avenue at that location.

Q. Of the Union Stockyard location? A. Yes, sir.

Q. You say that installation was in 1911 and discontinued in 1945? A. Yes, sir.

* * * * *

262 Thereupon—**Joseph Quigley** was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

* * * * *

Q. And you are employed in the office of the Water Department of the District of Columbia? A. That is right.

Q. And how long have you been employed, sir? A. Twenty-eight years.

Q. Are you familiar with the connections to the fire hydrants and water hydrants in the District of Columbia? A. In a way, yes.

* * * * *

263 Q. How close to the private property do your records indicate there were fire hydrants? A. Our records show the fire hydrant to the building line.

* * * * *

Q. Now, are you familiar, Mr. Quigley, with the roadway that ran from Benning Road down alongside of the east side of the old abbatoir property, you know where the road is? A. I think there was an alleyway there.

Q. Yes, an alleyway, you remember that alleyway.
254 How far down that alleyway have you been? A. I don't remember being in there.

Q. What do you know, yourself, of that alley?

* * * * *

The Witness: There is only an entrance there, as I remember it.

* * * * *

Q. Where is the entrance? A. Off of Benning Road.

Q. How far back have you been on that alley? A. Only on Benning Road, I haven't been in the alley.

Q. Yes, sir. Over what period of time have you known that? A. Oh, I would say twenty years.

* * * * *

Thereupon—**Harry R. Howser** was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. And you are employed in the District Government, are you not? A. Yes, sir.

Q. In the Office of the Engineer Commissioner and the Division of Bridges? A. I am the Engineer of Bridges.

Q. Mr. Howser, did you prepare the plans in connection with the Benning Viaduct? A. No, I did not.

Q. May I see what you have? You were subpoenaed to bring certain records? A. Yes, sir, this is the one that you wanted. You mentioned the facts about preparing the plans, I put up the bridges; I constructed it.

Q. You put the bridge up? A. Yes, sir, construction engineer.

266 Q. You have produced, under subpoena, a sketch.

How do you identify that sketch, Mr. Howser?

A. That is known as Drawing 203/26, that is sheet 26 of Bridge No. 203.

Q. What is that bridge? A. Benning Viaduct, the first part constructed in 1918 and 1919.

Q. And this sketch that you have here in your hands was prepared under what date? A. This is dated on March 4, 1920.

Q. Is that the record of your office? A. Yes, sir, that is the record of our office.

Q. Of the Engineer of Bridges of the District of Columbia? A. That is correct.

Q. Mr. Howser, I call your attention particularly to the part thereon shown as a road, west side road to stockyards. Does that appear on your survey sheet, what do you call this sheet, Mr. Howser. A. This is just a location plan.

Q. Does that road indication appear on the location plan? A. It appears here, that is all.

Q. And that is part of the records of your office? A. That is part of the records, yes.

267 Mr. Wheatley, Jr.: We offer in evidence the exhibit, if Your Honor please.

Mr. Denit: May I see it?

The Deputy Court Clerk: Is that the same as Exhibit No. 16?

Mr. Wheatley, Jr.: Yes, it is Exhibit 16. We offer this in evidence, Your Honor please, and I think we have offered before, a photostat which was admitted only for identification, No. 16 for Identification. We offer the original.

The Court: All right.

Mr. Wheatley, Jr.: If there is no objection, Mr. Denit, may be substitute the photostat for the original tracing which the witness has given?

Mr. Denit: Yes, sir.

The Witness: I have a copy here that was only made last Friday especially for you, if you would rather accept that. It is not a photostat, but it is a print.

Mr. Wheatley, Jr.: May we substitute the copy and call it 16-A? This is a copy of the official records of your office?

The Witness: Yes, sir, copy of this right here.

The Deputy Court Clerk: Do you want to substitute this for 16?

Mr. Wheatley, Jr.: No, I guess you had better mark it 16-A as an exhibit.

268 (Tracing for Benning Viaduct, 203/26, was marked Plaintiff's Exhibit No. 16-A and received in evidence.)

* * * * *

Q. Will you show to His Honor the outlines of the bridge as shown on that plan, Mr. Howser? A. The bridge starts right here at the intersection of Minnesota Avenue and Benning Road. It comes up on the right, here, 4-1/2% percent, and then enters the steel structure, crosses over to the abutment and then down the ramp, a total of 1440 feet.

* * * * *

Q. Where is the road line, street level of Benning Road on that diagram, the street level of Benning Road alongside the bridge? A. Oh, you mean the low level road. Your Honor, we have two low level roadways, one here is marked low level, and one here, so machines can go up and turn under and come this way, and you have the same thing on each side, to form access to properties on each side.

* * * * *

269 Q. You have indicated on your chart, "West Side Road to Keane's," where is that? A. That is right here (indicating).

Q. Is that alongside the right of way of the railroad?
A. According to this map, it is.

Q. The next roadway easterly of that, according to your map, is what? A. It is the entrance to the west side of the road to the stockyards.

* * * * *

270 Thereupon—**Jesse J. Kimball** was called as a witness on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Weatley, Jr.:

Q. What is your name, sir? A. Jesse J. Kimball.

Q. And your occupation? A. Chief Building Inspector.

* * * * *

Q. How long have you been employed in the District? A. Nineteen years and two months.

Q. Did you produce certain records subpoenaed from the Building Inspector's Office? A. I did.

271 Q. Do you have with you the permits in connection with the property owned by Adolf Gobel, which were filed in 1936? A. Yes, sir.

* * * * *

Q. * * * Do you have the plot plan here? A. Here is the official plot plan.

Q. Mr. Kimball, the enlargement of this plan which His Honor has on his desk, is what we want out, will you get that out of these papers? A. Yes, sir.

Q. Mr. Kimball, you have produced a plot plan in connection with what plant; that is a plot plan on file in your office? A. With the old Gobel plant, the abbatoir.

Q. And the building permit was issued in August, in 1936, I think, isn't that right, sir? A. August or April, install concrete footings, is that the one you have referred to?

Q. That is right. A. That was issued, it looks like 1/1/36.

* * * * *

272 Mr. Wheatley, Jr.: Your Honor please, this is the original from which the plot plan which has been Exhibit No. B attached to the complaint, I believe that it is Exhibit No. 3, sir, we offer the record of the Building Inspector's Office in evidence, if the Court please.

Mr. Denit: For what purpose is it offered?

Mr. Wheatley, Jr.: To show it is a record on file in the Building Inspector's Office in 1936 for the improved plant at this particular location, the Gobel plant, showing the roadway, the line of the buildings.

Mr. Denit: Do I understand this is simply the Building Inspector's Office record of the very same thing that is attached to the complaint as Exhibit B?

Mr. Wheatley, Jr.: That is correct.

Mr. Denit: We don't see any point in having two papers, identical, offered in evidence, but if counsel offers them——

Mr. Wheatley, Jr.: We do, for this reason, sir: Your Honor, the evidence was received before only for orientation purposes, and we would like to have the record show it is offered in evidence now.

Mr. Denit: Well, which are you offering, this or the other paper?

Mr. Wheatley, Jr.: I am offering the original that is on file in the Building Inspector's Office and, if the Court will allow, we will respectfully suggest that counsel would
273 allow a copy of that to be substituted so the Building Inspector can take it back with him, but we will offer the Building Inspector's record.

Mr. Denit: Mr. Kimball, was this made by your office?

The Witness: No, sir, it was approved by the office.

Mr. Denit: Prepared by somebody else?

The Witness: Prepared by the architect and submitted to the office, on which the permit was issued.

Mr. Denit: It only purports to be and is an architect's drawing of the area?

The Witness: Yes, sir.

Mr. Denit: It doesn't purport to accurately show measurements of any kind?

The Witness: It is supposed to show the location of the buildings, all on this plot of ground.

Mr. Denit: Was this as to existing buildings or proposed buildings?

The Witness: I assume, sir, this was existing buildings.

Mr. Denit: No objection.

Mr. Wheatley, Jr.: Mr. Denit said he had no objection, Your Honor please, so we offer it in evidence.

The Court: All right.

Mr. Wheatley, Jr.: Will you give me a number?

The Deputy Court Clerk: No. 24.

274 (Plot plan of area submitted by Building Inspector, was marked Plaintiff's Exhibit No. 24 and received in evidence.)

* * * * *

275-276 Thereupon—**Bernard O. Smyth** was called as a witness by the plaintiff and, having been first duly sworn, was examined and testified as follows:

277 Direct Examination

* * * * *

Q. And you are employed in the Building Inspector's Office, District of Columbia, are you not? A. Correct.

Q. How long have you been employed there? A. About 14 years.

Q. And have you had occasion during that time to inspect the property at the Gobel plant near Benning Road? A. According to the records, yes.

Q. When was that, sir? A. That was in 1937.

Q. And the date and time? A. The permit was issued on, I think it was April 27, 1937, that was the date of issue of the permit.

Q. What did you have to do with that permit, sir? A. The only thing I had to do with it was to inspect any work that was contemplated there, apparently there was no work done and the permit was eventually cancelled.

Q. Did you go out to the plant and inspect the property?

A. I must have done so.

278 Q. And what did you do when you went there?

A. Just inspected the plant to see if there was any work in progress, which apparently there had not been, I have no actual recollection of having been there.

* * * * *

A. Yes, I know the approximate location.

Q. You know the property. Have you been on the property before, that you recall? A. Not that I recall, but I must have been at that time, but that was so long ago I don't recollect it.

279 Cross-examination

By Mr. Denit:

Q. Does the record you have, show the date of cancellation? A. Well, the date of cancellation is shown as January 8, 1937. That is obviously a mistake, it should have been 1938, because six months has got to elapse from date of issue before cancellation; that was the turn of the year, so probably the 1937 was put down instead of 1938, by error.

Q. Was it by lapse of time? A. By lapse of time, after a period of six months.

* * * * *

281 Thereupon—**Kenneth G. Fernald** was recalled as a witness by the plaintiff and, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Wheatley, Jr.:

Q. Mr. Fernald, you were on the stand this morning and had the old map, Y-65? A. Yes, sir.

Q. Is this the copy of that map which you have prepared? A. It is a copy of a portion of it.

Mr. Wheatley, Jr.: Your Honor, please, may we have this marked as an exhibit in lieu of that Y-65 which was offered in evidence this morning?

The Court: All right.

282 (Photostat of Map Y-65 was marked Plaintiff's Exhibit No. 25 and received in evidence.)

By Mr. Wheatley, Jr.:

Q. Mr. Fernald, you were also asked on examination this morning about another map in your office, showing the alleyways through the Union Stockyard properties. A. Yes, sir.

Q. Did you find such a map? A. Yes, sir.

Q. Do you have it in your hand? A. Yes, sir.

Q. What is this, Mr. Fernald? A. It is Map Z-51.

Q. That is a record of the Surveyor's Office? A. Yes, sir.

Q. Under what date is that map? A. It was March 11, I think it was, 1906. It was March 11, 1906.

Q. Does that show the area which is now known as Parcel 168/50? A. Yes, sir.

Q. And surrounding areas? A. Yes, sir.

Mr. Wheatley, Jr.: We offer that in evidence, if your Honor please.

283 Mr. Denit: No objection.

• • • • •
(Map Z-51, Surveyor's Office, was marked Plaintiff's Exhibit No. 26 and received in evidence.)

Q. Will you show His Honor, please, the area under which Parcel 168/50 is embraced at the present time, with the alleyways? A. It is this portion down here (indicating).

The Court: How far down does it run, sir?

Mr. Wheatley, Jr.: It includes all of the plaintiff's property, Your Honor.

The Court: All claimed by the plaintiff.

Mr. Wheatley, Jr.: And goes beyond it.

The Court: And that is 1906 and has been an official record ever since that time?

The Witness: Yes, sir.

The Court: That is all I want to know.

By Mr. Wheatley, Jr.:

Q. Mr. Fernald, in addition to that, does that show a cross-alley, will you show to His Honor where the B. & O. Railroad is shown on that map? A. This is it, right here.

Q. Where is Benning Road? A. Benning Road, 274 in here.

Q. Is there a road or alley that is immediately east of the Baltimore & Ohio Railroad? A. Yes, sir.

Q. Where is that and how is it marked? A. Twenty-five foot alley.

Q. Is there another alley further east of that? A. Yes.

Q. And that runs completely, what length? A. Runs, I don't know exactly how far it is.

Q. The actual length, at least, of Parcel 168/50? A. I would think so, yes.

Q. Is there a connecting alley running from the first mentioned alley to the alley further east of the Baltimore & Ohio Railroad? A. Yes, sir, several of them.

Q. Several of them, thank you, sir. Where did you place the present location of the culvert, the culvert that is on the alley alongside the east part of the abbatoir property? A. Well, that is in here.

285 * * * * * * *
 Mr. Wheatley, Jr.: Mr. Fernald, do you have a copy of that map?

* * * * * * *

Mr. Denit: We have one here, if you want to identify it.

By Mr. Wheatley, Jr.:

Q. Mr. Fernald, the map you have, does not show the present buildings on it, does it? A. Not that I know of, no sir.

Q. No buildings are shown? A. No, I don't know whether these are buildings or closures.

Mr. Wheatley, Jr.: If Your Honor please, the copy which Mr. Denit has, appears to be a copy of the one which Mr. Fernald has just spoken of, with the exception of some figures.

286 Was this Map Z-51?

The Witness: That is right.

Mr. Wheatley, Jr.: And we have no objection to this being used in lieu of the one Mr. Fernald produced.

The Court: All right.

(Copy substituted for original of plaintiff's Exhibit No. 26.)

* * * * *

Thereupon—**George F. Jordan**, called as a witness in behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. Where are you employed? A. In the United States Coast and Geodetic Survey.

Q. In what position there? A. I am a cartog-
287 rapher.

Q. Explain to us what that is. A. A cartographer is a man that makes maps.

Q. And your official duties are in connection with maps of Coast and Geodetic? A. My official duties are in connection with making maps.

Q. Mr. Jordan, I show you an exhibit which has been marked in this case as Exhibit No. 14-A. That was produced from records of your office, was it not, sir? A. That is correct.

Q. Would you look at that, please, and tell me if you can identify the area of Benning Road, N. E., Washington, D. C., and the Baltimore & Ohio Railroad tracks? A. Yes, sir.

Q. And calling attention particularly to the area south of Benning Road and east of the Baltimore & Ohio Railroad tracks, would you show to His Honor the record of your office as shown thereon with respect to the topographical layout of the area thereon? A. Well, this is Benning Road, the Baltimore & Ohio Railroad tracks, this is Union Stockyard, I assume these to be cattle pens here. I would say there is a roadway here and a roadway here, there are other minor roads in that area also.

The Court: Now, is this a road here, too?

A. That, I wouldn't want to say sir, this is a railroad here, that could be a road or it could be a fence line in that area.

The Court: Is this an alley in here?

The Witness: I would say that is an alley, yes, sir.

The Court: And this is an alley here?

The Witness: Yes, sir.

The Court: What is this, across here?

The Witness: That is a culvert, I presume it to be a closed culvert, it is open here and open here.

The Court: I remember now. Thank you, sir.

By Mr. Wheatley, Jr.:

Q. That is a record of your office as of what date? A. Well, this was published in 1895, I believe the date is on here, but the original survey is on file in our office, made in this particular area between 1887 and 1891.

Q. And is that a public record? A. It is.

Q. And maintained, kept by Act of Congress? A. Oh, yes, definitely.

Mr. Wheatley, Jr.: Thank you, sir.

Cross-examination

By Mr. Denit:

Q. Made between 1888 and '91? A. I believe the survey was completed in 1891.

• • • • •

289 Mr. Wheatley, Jr.: Your honor please, that is the plaintiff's case.

Mr. Denit: Mr. Kogod, will you take the stand, please?

Thereupon—**Fred S. Kogod**, the defendant, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Denit:

Q. Your full name is Fred S. Kogod? A. That is right, K-o-g-o-d, Fred, S. is the initial.

Q. And Celia Kogod is your wife? A. That is correct.

Q. What business are you engaged in, Mr. Kogod?
A. Well, I am in the mercantile business, selling fixtures, and amusement business, operating some theaters in the City of Washington.

Q. How long have you lived in Washington? A. Since 1914.

Q. How long have you been engaged in business here?
A. Since 1919.

290 Q. Referring to the property involved in this case, did you acquire, through the Eastern Development Corporation, a tract of land from the Union Stockyards Company? A. Yes, sir.

Q. And that property was acquired in 1941? A. I contracted in 1940 and got title to it in 1941.

Q. Prior to entering into a contract to purchase the property, did you examine it? A. Yes, sir.

Q. Did you cause a survey to be made of it? A. I had the title company order a survey for me before I taken title to it.

Q. I show you what purports to be a survey, dated May 22, 1941, and ask if that is the survey you obtained? A. Yes, sir.

* * * * *

291 (Survey of property, dated May 22, 1941, was marked defendant's Exhibit No. 1 and received in evidence.)

Q. Now, will you take this survey, please, sir, which has been marked defendant's Exhibit No. 1, and indicate to His Honor the lines of your property and the lines of property adjoining it? A. Yes, this is Benning Road right in here and this is Minnesota Avenue, and there is an alley right in the back of this property which is adjoining my land, and my property begins over here to here, and that is the extreme end of Minnesota Avenue. I have, since then, given the District a piece of this corner and enabled them to curve in, this corner here has been dedicated to the District of Columbia, so it isn't quite as deep as this, but it is 14 feet less than this corner here. I gave the District 14 feet so they could make a turn at the viaduct. It comes off here to this land over here, and it comes over this way which is 81 feet and 64 points, you know, less than 82 feet, comes this way 37 feet 42. It turns this way 31.11 and comes this way 38.36, and turns again over here at an angle of north 76, 13 feet of it, 57 feet and comes back this way 65 feet, goes clear across this land 359 feet and 90 points, this way, and 152 feet this way, over here; and this is the property that belongs to Mr. Cogito,
292 the Gobel property that I had not acquired. I bought everything that the Union Stockyard owned at that

time, with the exception of this, which was owned by Gobel Company.

Q. The part you referred to as owned by Gobel Company is the area—— A. Approximately two acres over here which was at that time some dilapidated buildings, buildings that weren't being used.

The Court: Is that everything that is in here?

The Witness: It was owned by Gobel Company, all the rest was owned by Union Stockyards, and I bought all the property of Union Stockyards.

The Court: Of course, you don't admit any alley, but where would the alley be if it was on it?

The Witness: At the time I bought the property, there was a surfaced piece of black-top road here of 25 feet and there wasn't an alley besides that, that was any noticeable, other than a lot of lanes that was criss-crossing the property all the way across, where cattle came over and sheds with a way there, and sheds locked with some great, big locks on them, and so forth.

The Court: Well, the alley that is claimed by the plaintiff would come along this way, wouldn't it?

The Witness: Yes, sir, according to this.

293 The Court: I say the alley that is claimed by them would come across here?

The Witness: That is right.

The Court: All right, sir. I am just trying to get the locations in my mind, that is all.

The Witness: On this plat?

The Court: That is correct.

By Mr. Denit:

Q. Now, in addition to obtaining a survey, did you also obtain an examination of title by a local title company?

A. Yes, District Title Company, and they gave me an insurance.

Mr. Wheatley, Jr.: We object.

The Court: Any objection, I suspect, will have to be sustained. If the title company didn't do a good job, can't affect this case, can it?

Mr. Denit: No, I can't contend that is so.

The Court: That is all right, just so we don't have a misunderstanding about it.

By Mr. Denit:

Q. When did you first go upon this property for the purpose of inspecting or examining it? A. It was in the fall of 1941. I went over there with the real estate agent here in this city, Jimmie Zirkle took me there in his car and we parked on the land and we walked over it, 294 and it was just before I put my bid in for it.

Q. With reference to the so-called alleyway on the east side of the Cogito property, what did you observe, if anything? A. Well, the land that we are talking about was a fence along with other fences and in between the fences, there was some lanes where the stockyards used for various purposes of handling their business. Some of the fences were in pretty fair shape, some of them were knocked over, you know, some were dilapidated to some extent. There were gates separating the various bins, and also the enclosed sheds in the yards, and they had this type of areaways entering into each one of those various stock pens for hogs, sheep, cattle, and so forth.

Q. You mean the same kind of a way into the various stock pens as existed on the easterly side of the Cogito property? A. Yes. They had, you see, on the piece of property that I own adjacent to the present building, where the lumber yard is now, was a little shed, sort of elevated, what they called an office, used to call that an office, that was in place, alongside of it was fences on both sides and that fence went all the way along and there was fences in between, see. And those fences led to enclosed sheds like, you know, wooden buildings with roofs on them.

Q. I show you what has been marked Plaintiff's Exhibit No. 26 and ask you if you will indicate to His Honor what

you mean by passageways to the various pens.
 295 A. Well, on this part over here, sir, this is the 25-foot
 that was surfaced. This entered right into the
 building, into the property which was Gobel's property.
 Then, over here some place was an elevated shelf building,
 a tall building which was called an office. Along in here
 were these fences, see, which also had gates into these
 other buildings, fences and buildings, see, all along in here.
 In addition to these fences which held the animals when
 they were there, were also some buildings at various places.
 The buildings were lined with brick, on top was some nice
 yellow sand for cleanliness, and these areaways were
 blocked with some cobblestones, you know, for the animals
 to walk; along here (indicating).

Q. Now, with respect to the cobblestones in the alley-
 way—

The Court: Is this the map made in 1906?

Mr. Denit: 1906, yes, sir.

By Mr. Denit:

Q. With respect to the cobblestones in the alley on the
 easterly side of what is now the Cogito property, how did
 these other alleys compare? A. They were very similar,
 all of them were very similar.

Q. All of them paved? A. No, they weren't all paved.
 The only one was actually paved, was this one, this
 296 was the only one paved. This one had some cobbles-
 stones and some of them had cinders, you know,
 they were all fences on both sides with some areaways.
 I think this is the river, I think this one here was not an
 alley, this was a ravine that ran through the property
 that they used to wash into and enter the sewer. This
 acted in place of a sewer.

Q. You mean between these two double lines? A. That
 is right, this is a ravine, right underneath here is a culvert,
 see, and this is underneath the building, this goes under-
 neath one of the buildings some place. This went out

across Minnesota Avenue to the other side. It has just been closed over, a few years ago.

Q. The stream, you mean? A. That is right, the stream.

Q. Now, did this area which is designated on this survey as an alley, was that in existence at the time you first saw the property? A. To my best recollection, there was several alleys there. I couldn't swear this is exactly the place of it, but there were several of them along in here that took you to the various buildings that these animals were kept.

Q. Was it designated as an alley running to Benning Road, extends back to the extreme limit of the building shown here as pens? A. I don't think it went quite
297 that far. I don't think that the buildings were in that far at that time, because I have quite a distance in here, and you see, the buildings, I think, ran probably about this far (indicating).

Q. All of these alleys were paved in some fashion or other, then, with the cobblestones or cinders or some other? A. Yes.

Q. Had you known of this property, generally, before you went out there and looked at it with a view to buying? A. Well, yes, I was familiar with the property. Before entering into the fixture business and the theater business, I ran a couple meat markets and, from time to time, I used to go there to buy meat from Keane and Loeffler. So, for about a period of 1919, when I first entered in the grocery business, and until about 1930, I visited the place a good many times.

Q. When you visited there, how did you get to the Keane or Loeffler establishments? A. Originally, we used to come across Benning Road and go right into this place in here, inside in here (indicating).

Q. Was it designated as 25-foot alley? A. Yes, over this side was the Loeffler plant and the back of it was the Keane plant, and we used to drive in there and park our car and there was some platform, loading platform in there

and when we bought anything we want to take it
298 with us, they brought it out on the platform and put
it in the truck.

Q. Did you use this so-called alley on the easterly side
of the property? A. This (indicating)?

Q. Yes. A. No, never used this, and I don't think anybody ever used that for any other purpose except loading and unloading cattle, that I knew of. I never went there, as far as I knew this was a controlled, policed for animals. If anybody else went over it, I never saw it.

Q. Now at the time you were there looking at the property with a view to buying, was any part of the area being used for any purpose that you could see? A. No, the buildings in the back of the abbatoir was submitted to me and I looked them over and they were very badly dilapidated. I brought in a wrecking man to find out what it would cost or what I could get for them, and it was rather an expensive job to demolish. I didn't know they could be fixed up. Mr. Cogito did a very good job of fixing them over.

Q. Was anything going on in the abbatoir that you could see? A. No, sir, nothing. It was just idle property. I had some buildings of mine, the hotel on the corner
299 and a little building further up on my property, plus the sheds, there was two brick buildings plus a lot of wooden buildings on the property.

Q. Now, was there any business being conducted in the property which you subsequently purchased? A. The only thing that was still going was the corner hotel which I asked them to move out, so I could tear it down. He was paying, I think, \$25 a month, and that was the only life that was in the entire property.

Q. So far as you could see, there was no operation on the part of the stockyards? A. None whatsoever, nobody was going any business there except this corner hotel; in fact, it was a rooming house.

Q. Now, Mr. Kogod, there is testimony in this case that in October of 1942, Mr. Cogito talked to you about a fence

of some kind that he was either building or repairing. Do you recall any such conversation? A. Well, I can't remember the exact date, it might have been October, 1942, or it might have been a little bit later. But, the first time I met Mr. Cogito on the property was he had erected a fence and started over at about this road here, came along this way here, and was returning this way.

The Court: Let me see.

The Witness: He erected a fence that started from this paved road right in here about 20 feet or 25 feet away
300 from his property and he built, it was made of very rough wooden lumber, it was lumber that he would just saw up, you know, the board for fencing and he started erecting and had it all the way across and started coming across this way, and when I first noticed it, it was up about, well, about up to this ravine, this river, this ravine here (indicating). And at the time when I came up and saw the fence, there was nobody working on it and I came back a day or two later and found Mr. Cogito there. I asked him what he was putting up the fence for and he said he had bought the property and he was going to remodel it, and he wanted to put a fence around it for the purpose of remodeling it, to barricade it. I said, "Why don't you barricade it on your own property, why do you barricade it on mine?" And he said, "Well, I understand I have a right of way over your property and I want to take care of it." So I said, "Well, I don't think you are correct and I want you to take the fence down or else I am going to have to take action." I came back there about a week later and the fence was down. They tore it down.

By Mr. Denit:

Q. Was there ever any subsequent attempt to put a fence in this area? A. Not by Mr. Cogito, he never tried to put up a fence there after that. He tore that fence down
301 then, a few days after our conversation and that was the finish of that.

Q. Did you thereafter have a conversation with Mr. Cogito about a gate in the wall of his property? A. Well, that was considerable later. Of course, I had met Mr. Cogito many times in between time, but I came back from my vacation, it was the latter part of 1946 and there had been, on the side, there had been some brick columns with some iron fences put in between and one of the sections was made into a gate; and when I was there the first time, Mr. Cogito wasn't there, it was just the fence there, so I went up to see Mr. Grossberg, in fact, I called Mr. Grossberg on the phone.

Mr. Wheatley, Jr.: I object to what he told Mr. Grossberg.

Mr. Denit: Don't tell us what you told Mr. Grossberg.

The Witness: Well, I made a date with Mr. Grossberg and we went out there on Saturday between 11 and 12 on a Saturday, and not by appointment but just by chance, we met Mr. Cogito on the premises. I asked Mr. Cogito what was the—— why did he put the gate there and he said that whosoever he had hired to put the job up had no permission to put gates there, that he had bought the fencing from some surplus or some place and he had hired this fellow to put it up, didn't know there was any gates on the lot and the gates were a mistake and he was sorry it happened

302 And we walked around with him toward the back, he ordered one of the men to lock the gate and keep it locked. The man put a heavy chain around the gate and a lock on it, and the gate was locked for a long while. But there came a time when I came here again and found the gate unlocked. I took it up with Cogito again and he said he didn't know who broke the lock but he would see to it a very heavy chain and heavy lock would be put on it, and it wouldn't happen again. This happened—this gate would be open several times and finally one time, it was getting a year or two later, it was one of the last times I spoke to him about the gate. He said the Giant who was my tenant had some food in back there and they were opening the gate without his permission or without his knowl-

edge, without him knowing anything about it, and it was my tenant and therefore he couldn't do anything about it. I called the Giant and found it wasn't true, so I ordered it barricaded and we had a——

Mr. Wheatley, Jr.: I object and move to strike out the remark of the witness.

The Court: Motion granted.

By Mr. Denit:

Q. Don't tell us what you found out as the result of your talk with the Giant, I suppose you mean by that, Giant Food Stores? A. Yes.

Q. You put up a barricade? A. No, I sent my son-
303 in-law to see Mr. Cogito, unless he permanently——

Mr. Wheatley, Jr.: I object, what he did.

The Court: Well, he can say he sent his son-in-law, but that is as far as he can go.

Mr. Wheatley, Jr.: Yes, Your Honor.

By Mr. Denit:

Q. Did your son-in-law report to you that he had talked with Cogito? A. Yes.

Q. After that what did you do, don't tell us what your son-in-law said. A. I ordered it barricaded.

Q. And that was the barricade in the form of a sign across the property? A. Yes, I had a sign that I had kept on Flower Development, and I was practically finishing up there, had no further need, ordered it back to my shop, had it repaired and repainted with "Free Parking for Senator Patrons" and had it put up there to serve as a barricade plus a sign for my parking.

* * * * *

304 (Photographs were marked Defendants' Exhibits Nos. A-2 through A-13 and received in evidence).

By Mr. Denit:

Q. I show you photographs which have been marked as Exhibits Nos. A-2 through A-13. A. There was one part of the conversation I forgot to mention.

Mr. Wheatley, Jr.: I can't hear you.

The Witness: There was one part of the reference to the fence that I forgot to mention that I had with Mr. Cogito.

By Mr. Denit:

Q. If you hadn't completed your answer, I think you are entitled to do so.

The Court: Of course.

The Witness: When I met Mr. Cogito after the fence was tore down, he told me that when he put the fence up, at that time, he had not received title to the property, but after receiving title to the property, he found that he didn't have the right-of-way of the alley that he thought he originally had, but he did have a right-of-way over the 25-foot paved alley which is the first one, which we contested at that time, but after checking into it later, we conceded that 25 feet.

By Mr. Denit:

Q. That is the 25-foot paved road nearest the rail-
305 road track? A. We at first didn't think he had any right of way, we contested that one, too, but after he had gotten title to his land, he came back to us and he said that he found we were right about all the others, but he did have a right to the 25 and we conceded that.

Q. Now, I show you these photographs which have been marked defendants' Exhibits A-2 through A-13, inclusive, and ask you to examine and tell us whether or not they are photographs of the property belonging to you and the Cogito property immediately adjacent thereto? A. This picture shows——

Q. No, just tell us whether they are photographs of the area. A. Yes, this one is; I imagine the rest are (examining exhibits). Yes, sir.

Q. Now, directing your attention specifically to the photograph marked A-1 for Identification, will you point out to the Court the location of the so-called alley on the easterly side of the Cogito property? A. Yes, the alley we are talk-

ing about is this space in here, this is Mr. Cogito's property, the rest is mine, facing this way; this is where the theater is and this is all of my property and this is the alley they are talking about in question now.

306 The Court: Well, gentlemen, I am very glad to look at these photographs, but we went out there yesterday. Is there anything these photographs will show me that I didn't see yesterday?

Mr. Denit: No, I don't think so. There is one, I think maybe Your Honor did not see yesterday, that I will direct attention to. We are offering these in evidence as a matter of record.

The Court: Yes, certainly.

Mr. Denit: We offer these photographs in evidence.

(Defendants' Exhibits Nos. A- and A-1 for Identification were received in evidence.)

By Mr. Denit:

Q. Now, Mr. Kogod, I direct your attention to Defendants' Exhibit No. A-8. I wish you would take this photograph, please, sir, and indicate to the Court whether or not there are any parts of an old fence or hinge indicated in that photograph. Show it to the Judge. A. When I bought this property, Your Honor, there were two gates, there was one beyond there and another one over here, and the hinges of this gate are still in place, one in the bottom and one in top. But there was another fixed to a post that closed this alley over.

The Court: This same alley?

The Witness: This same alley.

307 The Court: Is this it, right here?

The Witness: That is right. There were many more, but there was this one and this one and the hinges of this one are still in place.

The Court: How far is that from Benning Road?

The Witness: This is, I would say, 100 feet. I would say

this one here is about along in here, the first one is along in here and that one is in there (indicating).

The Court: All right, sir.

By Mr. Denit:

Q. Was there a gate at the point which you have just pointed out to the Court? A. There were several gates, sir, there was one particular place there, yes.

Q. Can you describe the general appearance of the gates? A. Well, they were wooden gates on heavy iron hinges, and they closed the alley up; they, you know, they would fling open and close up.

Q. I show you a photograph marked Plaintiff's Exhibit No. 18-B and ask if you can find in that photograph a gate that you saw? A. This is the first gate.

Q. Which is the first gate? A. This one here, this is the one that you did not see on the hinges, this is the first one.

308 Q. And by this is the first one, you mean this timber on the right-hand side of the photograph? A. That is right. This is the first gate, sir, not the very first one out here, I am not speaking of this one, but the first one from this alleyway here. When we tore all the other gates down, we left this one there.

The Court: All right, sir.

By Mr. Denit:

Q. Now, with respect to the buildings shown there, is that the so-called Loeffler sausage plant? A. Yes.

Q. And that is the building now occupied by the lumber and Millwork people? A. That is correct.

Q. With respect to the north face of that building, what was the location of this gate? A. You mean this gate here (indicating)?

Q. Yes. A. You mean was the hinge on it?

Q. Yes. A. This one was hinged on a post.

Q. How far away from the north face of the—— A. Right against it.

Q. Right against the north face of the building? A. That is right.

309 Q. That would be just east of the little culvert, is that correct? A. That is correct.

Q. Was that gate there at the time you saw Mr. Cogito attempting to build a fence around the property? A. Yes, I think so.

Q. Did you have any conversation with Mr. Cogito about some timbers that were located in this little alleyway? A. A little beyond the culvert, there was a wall, a tall wall, and the tall wall was held by heavy timbers. I would say they were at least eight or ten inches square, and they projected over into my property and before I had met Mr. Cogito, I got in touch with the Gobel Company and they referred us to Mr. Cogito and eventually Mr. Cogito removed them.

Q. And they were located within the confines of this alley? A. Yes, right on the alley.

Q. Now, Mr. Kogod, have you observed people using the Cogito property? A. No, no one was using that property.

Q. No, I said have you had occasion to observe people going to and from the Cogito property? A. You mean recently?

Q. Yes, sir. A. After he bought it?

310 Q. Yes, sir. A. Yes, sure. See, our question with him has never been any argument over an alley until very recently. My argument with him was that they were using my two areas, I have two driveways for my private parking space which were built for the purpose of holding automobiles and when we built them for the purpose of building automobiles, we put about six inches of gravel and two inches of black top and that will survive many years of wear. But, he kept—I don't say he kept them, but trucks kept coming over my property which were heavily loaded and they kept breaking out great big spots out of my driveways and I have to keep repairing them. I spend hundreds of dollars repairing them and that is what

kept me after him to close the gates up, so they wouldn't be coming over my property and they would be coming over on Benning Road; and that is why we gave the District an additional space, so they could make their turn there, so they wouldn't go over my property.

Q. Now, you said something about building automobiles; you meant parking automobiles? A. That is right, building a parking space. If we were preparing a parking lot to hold heavy trucks, we would put at least six inches of black top to hold heavy trucks and trailers, but two inches just keeps breaking up.

311 Q. Now, with respect to vehicular traffic going to and from the Cogito property, have you observed what route was followed generally? A. Well, I have seen nearly all of their trucks, that whenever I see them, go down there, use either the entrance alongside the post office or alongside the Giant, coming in and going out to his buildings.

Q. How about using that alleyway on the east side of the property? A. I haven't seen that being used, frankly.

Q. Well, what course would the trucks or other vehicular traffic take, coming to and going from the Cogito property? A. Well, they go right over my property in here and either make a little left and go between the post office or take a little bit of a right, whichever seems to be the open one, and most convenient, and they will go right through my parking into Minnesota Avenue, that was the nearest and direct route for them to take. And I have stopped many of the trucks and they said they didn't know they couldn't use it, they thought it was the same ownership.

Q. Have you observed trucks going to and from the Cogito property entering by means of the entrance to your driveway and going directly across your parking lot? A. Yes.

Q. And directly into the gate of the Cogito prop-
312 erty? A. Yes, that is, when it is open, when it was closed, they didn't use it.

Q. Have you ever seen any vehicular traffic using this alleyway to get to the Cogito property? A. Oh, yes, when this was closed, that is the one they used to use.

Q. No, I am talking about the so-called alleyway on the easterly line of the Cogito property. A. No, see, there hasn't been any alleyway; when Cogito bought that property, that alleyway had disappeared.

313 Q. You made certain improvements on your property? A. Yes, sir.

Q. Consisting of what? A. Well, the first thing I did, I tore down the brick buildings and the sheds and the fences, and so forth.

Q. How much of that had been done before you had this conversation with Cogito in October, 1942? A. As far as I know, it was all tore down with the exception of that one gate.

Q. All right. What else did you do? A. Then, I of course, I built the buildings and before I opened the stores and the theater up, I put a parking area in back and, to obtain my permit—

Mr. Wheatley, Jr.: I object to obtain, what he did.

The Witness: What I did is this: You see, Your Honor, after I tore down this property over here and all this property in here, there was some other property I tore down, all these sheds; I built a theater in here, which is better shown in my own survey, I had it drawn into my surveys, and I put this area in here into parking. And I put a fence up along in here, that was a requirement, and I put a fence up there with posts about this high, about four feet above the ground, with a cable bored into each pole, a cable drawn through, which we bought from the Transit Company, and that closed up this area. See, we had a curb in

314 here, we had an opening in here to drive in, we had an opening in here to drive in, we had a curb from here up to here, and from here we had these posts all the way across with this cable.

The Court: I was out there yesterday.

The Witness: The posts are not there, now.

The Court: I know. I was out there yesterday, I saw some posts that had been put along here on the east side.

The Witness: Those posts are right here, sir.

The Court: Well, wherever they are; well, maybe they are, on the east side of this alleged alley. How did those posts get there, sir, do you know?

The Witness: Yes, we originally put those posts right in front of this gate, wherever this gate is, and then when Mr. Cogito objected to it and our attorneys entered into a decree, we moved them down, but most of them had been knocked over, that was for the purpose of trying to keep them from running over my property, but most of them have been knocked over, except my sign. They still come over it.

By Mr. Denit:

Q. When you refer to a decree, you mean stipulation, I take it, don't you? A. Whatever it was, I moved the posts after you told me to move them 25 feet away from the building line, I believe 25 or 30 feet, I don't remember exactly; but moved them down so it wouldn't still be
315 running over our property, but most of them have been knocked down but a few left, which weren't in the way. But those that were left in the way to keep them from coming over our property, have been knocked over by the trucks and I haven't replaced them.

Q. Now, other than that you have already told us, did you have any further conversations with Mr. Cogito with reference to the use of this alley? A. Well, he has asked me for permission to use it once or twice which, when he first came there, he needed to deliver some materials and I told him as long as he didn't abuse his privilege, he could go ahead and use it. I wanted to be a good neighbor, and he asked me for, or his agent asked me for permission to bring gas into his property and I gave permission for that. You see, there has never been any controversy over the alley outside of when he was first approached, before he took title to it, from that time on until 1948, I had no reason to think

Mr. Cogito is ever going to bring up a question of an alley. He had conceded to us, when he first got title, that he found out he had a 25-foot entrance.

* * * * *

316 Mr. Wheatley, Jr.: What did he say to you, sir?

The Witness: He asked me if it would be all right for him, we had the roadway blocked off there, first, we had a gate, somehow or other, the gate disappeared. So, we put a cable across and he asked us to take it down for a while and he would like to use it to bring some brick in there and some materials and he would not abuse his privilege; instead of his coming from the inside, it would help him if I let him use it from the outside and we took it down.

* * * * *

Well, he said to me when he got title to the property he found that he had the 25-foot right of way and he did not have any other right of ways, which he had thought at first that he did have.

Mr. Denit: You may cross-examine.

317 Cross-examination

By Mr. Wheatley, Jr.:

Q. Mr. Kogod, you had, when you first went out to the place that you bought eventually, somewhere in 1940—did you have this survey sheet with you? A. In 1940?

Q. Qes, sir. A. No, I got this in 1941.

Q. In 1941? A. Yes, sir.

Q. And did you have with you this plat which was introduced in evidence and I think is Exhibit No. 26? A. No, I had a plat that the real estate agent brought me, which was very similar to this.

Q. Did it show the alleys, and so on, on it? A. At that time, I don't recall, frankly.

Q. Well, was it, in form, similar to the plot plan His Honor has before him, the Exhibit 3, was it a form similar to that, sir? A. No, I tell you, on the plat that I bought

the land on, frankly, it didn't show anything in here with the exception of the lines.

Q. You mean the alley lines? A. The lines of this property, that is all it showed. I think it will show you better over here, this is all it showed was this in here, we
318 knew we were buying all the land available with the exception of two acres.

Q. Yes, sir, and so, what you bought was all the ground around Mr. Cogito's place? A. That is correct.

Q. And the survey shows simply the lines of your purchase? A. That is right.

Q. As shown by your deed, is that correct, sir?
319 A. Yes, sir.

Q. Now, just for the purpose of the record, I understand you concede that Mr. Cogito has a 25-foot right-of-way that comes into his place from Benning Road alongside of the Baltimore & Ohio Railroad track, is that correct?
A. That is correct, yes, sir.

Q. That wasn't shown in your survey, was it? A. No.

Q. That wasn't shown in any paper that you had with you at that time? A. That is right.

Q. Now, you had occasion to visit there, what was it, 1911 to 1930? A. No, I started going to that plant around '19, it may have been in '17 or '19.

Q. 1917 or 1919 and continued to when? A. I got in the grocery business in May, 1914, I entered the grocery business but I worked for other people for five years, which I was a butcher. In 1919, on March 10, I went into business for myself and bought the first store at 6th and M Streets, S. W. A couple years later, I bought another store at 7th and D Streets, S. W.

Q. What I am particularly interested in is when did you first go out to this property? A. Well, we used to buy, from time to time, we would buy meat at the slaughter house, cattle or hams, and so forth, and maybe once
320 a month or so, we would take a trip down there.

Q. Yes, sir. A. We would buy everyday from the wagons or salesmen, but every so often, I would go up there.

When we first started going up there, there wasn't any viaduct, just right over the railroad track and go into the yards.

Q. Now, when you went there, did you only go to the part of the building which maybe we should call the front part, that is on the Benning Road side? A. That is the only part I ever went to.

Q. That is the only part you went to, you know the yards ran back southerly? A. Oh, yes, I used to see the cattle there. Of course, I knew they were there, sure.

Q. There was up front alongside Benning Road, look at this spot plan before His Honor, there was the office of the stockyards up there, was there not? A. Well, when I first started going down there, there wasn't

Q. When was that put there, sir? A. I don't know, I imagine that might have been put down there probably before 1920; I don't know, but this wasn't there when I first started.

Q. That was put there later, wasn't it? A. Yes.

321 Q. And you had occasion, when you came in from Benning Road—— A. Came in this way and go these tracks and go right in here, park right along in here.

Q. That is marked "paved road" on there, in't it? A. That is right.

Q. You concede, now, that is a right of way to Mr. Cogito's property, is that correct? A. That is right.

Q. And later you had occasion, when you had to go over the viaduct, to cut around and come back down the Benning Road, didn't you? A. Yes.

Q. Now, what road did you use coming into the plant? A. We would go over this viaduct over here and make a sharp turn to the right and come in here and go over this roadway.

Q. What about the road that now runs or did run at that time, alongside the easterly side of the plant, did you ever use that? A. No, never had any occasion to use that, because there wasn't any reason for me to use it. There

was ways for cattle, livestock, I didn't buy or sell livestock, so therefore I had no reason to use it. This here was policed, see?

Q. Did you see it? A. Oh, sure.

322 The Court: Did you say "policed"?

The Witness: There was a watchman in here to keep people from coming in or out.

By Mr. Wheatley, Jr.:

Q. Was there a roadway that connected the alley on the eastern side of the premises with the right-of-way, a paved road? A. I didn't get the question.

Q. Was there a connecting road between the part you say is down? A. Down here, no sir.

Q. Never was? You never saw one? A. Never saw one.

Q. You say you never saw anyone except cattle on the roadway that ran from Benning Road back to the abattoir facilities, is that correct? A. That is correct.

Q. Now, Mr. Kogod, how was that roadway that ran from Benning Road back along the abattoir facilities, how was it paved? A. This one here?

Q. No, sir, this road (indicating). A. I was never on it.

Q. Never on it? A. Until I bought it.

323 Q. Until you bought it. And when you bought it, that was in 1941, is that right? A. I bought it in 1940 and got title in 1941.

Q. And what did you see in the way of paving construction on that road at that time? A. When I bought it, there was some cobblestones along in here, started a little before this bridge, you know, a little alongside in here and it came over this way (indicating).

Q. You are indicating it came southerly along the eastern side of Mr. Cogito's place? A. That is right.

Q. From the culvert? A. That is correct.

Q. And how far back did it go? A. Well, I don't know how far it went, it went about as far, probably, as the present gate or a little further.

Q. You mean where the iron gates are now in the side of his property? A. Yes.

Q. It went that far back and a little further? A. Yes, but we had others over this way of the same type.

Q. You mean cobblestones, too? A. That is right.

Q. How far out to Benning Road did the cobble-
324 stone go? A. Well, when I bought it, see, the cobble-
stone stopped along in here someplace.

Q. Yes. A. From here, it probably was in cinders or something. I don't know.

Q. There was a roadway there, wasn't there, Mr. Kogod?
A. There wasn't much sign of a roadway, there were some paths in there, because it had grown up, see, it was pretty much covered up and the cobblestones weren't in there.

Q. Were in there? A. Were not.

Q. Were not. Now, at the Benning Road, where the road comes into that passage way, were there cobblestones?
A. This one here?

Q. No, sir, the alley; for purposes of our conversation, let's call that alley. A. This one here?

Q. Yes, sir. Now, when that alley came into the Benning Road, was there a cobblestone connection between that and the roadway, the street pavement? A. No, not from here out, that is what I said before, there were cobblestones this way (indicating).

Q. At the line of the street? A. Yes, there were some cobblestones in here, yes, sir.

Q. In other words, the street itself is a concrete
325 pavement, is it not? A. Black top, yes.

Q. And where the present road that runs alongside of the abattoir goes into it, there is a cobblestone entrance-way, is there not? A. No, when I bought the property, there was some cobblestones all the way across here (indicating).

Q. What is the situation there now, sir? A. I think most of it has black top, it didn't go far, but there was cobblestones in here.

Q. Can you tell us the condition now at the intersection of Benning Road with this alley way, is it cobblestone or not? A. No.

Q. It is not cobblestone? A. No.

* * * * *

Q. I show you Plaintiff's Exhibit No. 19-B, the American Company Mill Work Lumber Company Building, which is shown in that picture, is at the north end of the Plaintiff's property, isn't it? A. I imagine that is north.

Q. I mean that is the extreme end of Mr. Cogito's
326 property? A. Yes.

Q. And you own the ground right in front of it, is that right? A. That is right.

Q. How do the people who have access to the lumber building there, the offices there, get into and out of that building? A. Right now?

Q. Yes. A. Well, you see, this fellow is renting from me, so he is getting in and out, out of this place here, because he is renting this from me and this from Mr. Cogito.

Q. The building from Mr. Cogito and the lot from you? A. That is right, see, this has just been put in, this has just been opened up.

Q. Oh, yes. But during the years that you have owned the place and Mr. Cogito has owned the place, access has been made to that building from some roadway in front, hasn't it? A. No.

Q. Well, how do they go in and out the front of that building? A. Well, they didn't go in and out through the front of this, they went in through the other side, through the interior.

Q. All the time? A. Yes.

Q. Has there ever been any truck traffic into that
327 building from the time that you have owned it, that you owned the ground in front of it? A. No.

Q. Never? A. Not to my knowledge.

Q. All right, sir. Then, the culvert that you were speaking of in the picture you showed to His Honor, is shown in

this photograph right alongside of the building, isn't it?
A. You mean this culvert?

Q. The culvert, there is a creek that goes under the culvert? A. Yes.

Q. And that goes under this same building, doesn't it?
A. That is right.

Q. And between the culvert—there is an area that is used as a passage, isn't there, now? A. Where?

Q. It goes right over the culvert, isn't that right? A. You mean this here?

Q. Yes, sir. A. Yes, sure, this is the alley you are talking about?

Q. That is correct. The culvert is right alongside of the building that is on Mr. Cogito's property? A. That is right.

Q. How far back does that passageway go? A. I
328 think it goes to about where the gate is, or a little beyond it.

Q. The iron gate of Mr. Cogito's property? A. Yes.

Q. Now, at the time that you bought the property, you said you walked around and saw the property, didn't you?
A. Yes.

Q. Was that culvert there? A. Yes.

Q. And was that driveway there? A. Yes.

Q. And there was, I think you said, a crosspath in front of that culvert, is that correct? A. I said there was a gate in there——

Q. Was there a passageway across in front of the culvert? A. It wasn't noticeable at that time, no.

Q. Well, where was the other cobblestone alley that you spoke of? A. Oh, they were in here, you know, along in here there were several of them in there on my ground.

Q. All right, sir. Now, Mr. Kogod, how was that ground immediately south of the culvert covered? A. When you say "south", I get a little confused.

Q. Looking south from Benning Road toward the rear of

Mr. Cogito's ground, how was it covered? A. With
329 cobblestones, same as it is now.

Q. The same as now? A. That is right, hasn't been changed.

Q. Now, then, from that point north to Benning Road, how was it covered? A. Well, from this over here, a few feet was cobblestone, from then on, it had disintegrated, it might have been some cinders, but there wasn't any cobblestone, I don't know what was there.

Q. You don't know what was there? A. Not any cobblestones, might have been some cinders, there was fences there, there was a path there, but it wasn't surfaced.

Q. Was there a defined passageway out to Benning Road? A. The fences led all the way to Benning Road.

Q. Right out to Benning Road? A. Right.

Q. That is what the flagstone paving was that the surveyor testified to? A. Yes, I don't know where he got the flagstone, he was supposed to make the survey is 1943 and I bought it in 1940 and there wasn't any flagstone there in 1940 and there is not any there now.

The Court: Is it your testimony that at the entrance of the so-called "alley", at the present time there are no cobblestones?

330 The Witness: There is a little bit of cobblestone, sir, right along in here, this must have been a cobblestone street at one time all along in here, and there is a little bit of cobblestone——

The Court: I don't know what that is.

The Witness: This is Benning Road, sir.

The Court: Is it your testimony there are no cobblestones here?

The Witness: There may be, as I say, a little bit because there was a little bit all the way across, like a little gutter, you know, like a drain out of cobblestone, and there is a little bit of cobblestone all the way along in here like a sort of a funnel.

The Court: All right.

The Witness: But there is no cobblestone between here and here, right in here. This cobblestone was along in here like a, well, it is like a drain.

The Court: I see, sir.

By Mr. Wheatley, Jr.:

Q. Mr. Kogod, I understood you to say the last answer you gave us before you left the stand that there were no cobblestones at the Benning Road end of that alley. Do you want to correct it now? A. Except, I said along the line of Benning Road there was a part, I don't know how many feet of it, of cobblestone all along there, I don't
331 know whether that came off a street or whether it was a method of carrying water off, or what it was, but it was all the way along from Minnesota Avenue all the way back over my land.

Q. Yes, sir. Now, Mr. Kogod, you took over the property somewhere in 1941 or 1942, is that right? A. 1941.

Q. The Eastern Development Company is really your organization, isn't it? A. Owned by my wife and myself.

Q. And you are the principal stockholders and officers, it is your outfit? A. That is right.

Q. You acquired that from Union Stockyards by direct deed, didn't you? A. That is right.

Q. So, you have been the one person in possession of that property since the Union Stockyards conveyed it to you, is that correct? A. That is right.

Q. Now, when you went into possession around 1941, and between that date and the time Mr. Cogito acquired the property is 1943 and the surveyor, Mr. Mannar, made his survey in which he shows the flagstone paving up from the Cogito property up to Benning Road, was there any change in that property? A. Between the time—

332 Q. That you bought it and the time that Mr. Mannar made his survey? A. Oh, yes, considerable change.

Q. Did you put the flagstone paving in? A. No.

Q. You did not? A. No, sir. I put gravel there, a lot of gravel there.

Q. I see, and did you grade it off so as to eliminate the driveway? A. Didn't do it to eliminate any driveway, no.

Q. Was there a driveway there? A. Well, if I can explain to you the change that took place——

Q. Please do. A. See, where the hotel and the building adjacent to the hotel from Benning Road, it shows on this other property, they were sunk in, they were considerable low. If you notice, the back of the Senator Theater, to give you a little idea of what happened there, that is 15 feet of sill. The Senator Theater in back looks like it is elevated high, but it is actually street level or curb level rather, but we filled that 15 feet and run it back there and on top of that we had to put a lot of gravel for parking, that sort of sloped like a pan into there. That whole part was low. That end of my land was low. My far end, where the Giant
333 and the Gas Station, was high; that was excavated, I had to take a lot of that land off, but this, I had to fill.

Q. Now, let's look at the plat in front of His Honor, Mr. Kogod, you look at that plat, if you will. You see the area of Benning Road. A. This is Benning Road?

Q. That is right. See where the stockyard office is marked on there? A. Yes.

Q. You remember where that was, don't you? A. Oh, sure, I tore it down.

Q. You remember where this place is shown on there that we claim is the alley that runs alongside it? A. Yes.

Q. Between that alley and Minnesota Avenue, it was ground level or indented? A. Well, that was about the same height it is now, it was flat, it is a low part of my land.

Q. Was the driveway elevated above the rest of your ground or was it depressed? A. No, it was about even, you mean this here macadam?

Q. I am speaking of the alleyway there, was that all on the same grade it is now or was it a different grade? A. It might have been a little lower, I am not sure.

334 Q. Can you remember, sir? A. As far as I recall, see, I didn't do anything with this to make a change over here, see, other than fence it in.

Q. Where did you put the fence? A. Right in here,

Q. When did you take it down? A. I didn't take it down. It automatically rotted away and we just never replaced it.

Q. In less than—what period of time? A. Well, I put the fence up in the early part of 1942 and it decayed, I guess, in about five, six years, most of it. Part of it we tore down when we built the post office, there was still several posts and the rope there.

Q. Now, Mr. Kogod, I think you told us you had occasion to go out to the Loeffler part of the plant numerous times in the early years? A. Yes.

Q. And that was in the days before the Benning Viaduct was put up, wasn't it? A. I started before the viaduct was built.

Q. Really, your concentrated attention was drawn to the northerly part of the ground and not to the rear, is that correct? A. I never went over the rear.

Q. But you have a distinct recollection of the front
335 part, don't you? A. Oh, yes, sure.

Q. Now, there were lanes down from Benning Road that you took, a roadway that you took, wasn't there? A. I took Benning Road, yes.

Q. You took Benning Road and then there was a road that came in alongside the railroad tracks? A. Yes.

Q. Into the Loeffler Plant, you remember that, don't you? A. Oh, yes, sure.

Q. Did that have a fence around it? A. No, the fence was further up.

Q. Well, how far up? A. Well, it was on the other side of the office.

Sir? A. On the other side of the office.

Q. And there was no fence along the roadway that came down by the railroad tracks? A. No, you could park there.

Q. You could park there? A. Yes.

Q. And you can remember it even from the time before the stockyard's office was built? A. There was a little office there before, but it was very old and they must have torn it down, I mean, I wasn't there when it was torn down,
336 but I knew this building I tore down was not the first office that was there.

Q. Look at that, Mr. Kogod, do you remember the Loeffler place when it looked like that, with its old Benning Station and there is Benning Road and there is the road you came into the Loeffler Plant, there is the Loeffler place, the stockyard's office and the auxiliary alley, do you remember that? A. Yes, that is right.

Q. Is that a true picture, as you remember it? A. Where is Benning Station on this?

Q. There is Benning Station, you crossed the track right there and came right there, there is Benning Road, it runs right in front of the line. There is the fence and here is the road you came in, is that right, sir? A. Yes, it was fenced in.

Q. That is a fair picture, that is a true picture, as you recall it, is that right, sir? A. That is right.

Mr. Wheatley, Jr.: We offer it in evidence, if Your Honor please.

The Witness: I don't know when that picture was taken.

Mr. Wheatley, Jr.: That is your recollection of it at that time, though?

The Witness: Not when I bought it.

Mr. Wheatley, Jr.: Oh, no, no.

337 Mr. Denit: May I ask counsel, when do you claim this picture was taken?

Mr. Wheatley, Jr.: That picture was taken prior to completion of the viaduct, the viaduct was completed in 1919, according to stipulation of counsel in the record.

Mr. Denit: That could be any time.

Mr. Wheatley, Jr.: Well, it is within the memory of this witness, he has already testified.

Mr. Denit: We submit, if Your Honor please, that conditions existing long prior to the acquisition of this property by the witness, with which he had no knowledge, certainly are not binding upon us and do not reflect any evidence which would enable a court to resolve the issue here.

The Court: Well, it is just one of the factors in the case, sir. The question of continuity of possession arises as an issue in the case and if this witness, who is a party to the suit, remembers anything, any condition which existed there prior to 1919, it may or may not reflect on how the issue should be resolved in this case. I don't know what is on the photograph, myself, I don't know whether it shows this alleged alley or not.

Mr. Wheatley, Jr.: Yes, Your Honor.

Mr. Denit: Where?

Mr. Wheatley, Jr.: Right here, running right alongside the stockyard office, right by the scale connecting up
338 with the auxiliary alley.

Mr. Denit: You may see it, but I can't see it.

Mr. Wheatley, Jr.: Well, we offer it in evidence, if Your Honor please.

The Court: Well, the Court thinks it is admissible in evidence in view of the witness's testimony that it correctly reflected the conditions which existed sometime prior to 1919 and since 1906.

Where do you say the alley is, sir?

Mr. Wheatley, Jr.: Your Honor please, the driveway which the witness concedes is now the right-of-way of the plaintiff into the plaintiff's property, is here. The auxiliary alley is in front and runs in front of Loeffler Provision Company Sausage House and the alleyway runs from that building right past the stockyard office right into Benning Road, and the fence that the witness is talking about is this type of fence.

The Court: Is this the paved road we are talking about here?

Mr. Wheatley, Jr.: That is correct, that is this road here, sir.

The Witness: And this is Benning Road, is that correct?

Mr. Wheatley, Jr.: That is correct.

The Court: And this is an alleged auxiliary alley and this is an alley that is in issue in this case?

Mr. Wheatley, Jr.: Yes, Your Honor.

339 The Witness: There is no alley there, is there?

The Court: It is an alley or a fence, I don't know.

Mr. Wheatley, Jr.: Isn't that the scale, Mr. Kogod?

The Witness: No, that is the viaduct, that is where the gate was.

Mr. Wheatley, Jr.: And it runs from there out to Benning Road, does it?

The Witness: No, I imagine it closes one of the sheds in here.

Mr. Wheatley, Jr.: Is not that area the alleyway leading alongside the eastern part of the plaintiff's property?

The Witness: Not on here, I don't see it on here.

Mr. Wheatley, Jr.: Is it a fact that there was one there, sir?

The Witness: In here?

Mr. Wheatley, Jr.: Yes, sir.

The Witness: I don't think this picture is a true replica of this.

Mr. Wheatley, Jr.: Is that picture a true replica of your recollection of the place at the time?

The Court: Mr. Wheatley thinks that this shows an alley here. If it does, it corresponds with the alley here. Now, your idea is it is not an alley, is that what you say?

The Witness: That is right, that is a fence.

The Court: And on which side of the—

340 The Witness: I think this is an earlier picture than the one—I think there must have been some changes from that time and the time I went to the slaughter house.

The Court: All right. Well, the Court will admit the photograph and when counsel argue the case, they can present their views as to what it shows. It is not clear to me exactly what it is.

(Early photograph of area was marked Plaintiff's Exhibit No. 27 and received in evidence.)

* * * * *

By Mr. Wheatley, Jr.:

Q. Mr. Kogod, do you remember— A. There was one question you asked me about the front of the lumber yard, you know, about the lumber yard having entrance in there. Before the lumber yard opened down there, that thing was all closed up with the exception there was a platform there and we asked Mr. Cogito to remove it and he promised he would.

Q. When you say "we" who do you mean? A. There were two of us at the time.

Q. You and who? A. Another person.

Q. Who? A. Mr. Grossberg.

Q. What date? A. Well, it was within a short
341 while after he purchased it.

Q. I see. Now, Mr. Kogod, you said there was no roadway in front of the building which is rented to the lumber yard, is that right? A. When I bought the property, there was no evidence of a roadway.

Q. There was no evidence of a roadway. Do you remember any time when there was a roadway in front of that building? A. No, sir.

Q. Sir? A. I don't remember that.

Q. You don't remember? A. No.

Q. Now, this is the building we are speaking of. A. This was a window.

Q. Is that the same building that is shown in this picture as the Loeffler Provision Company? A. I don't think so.

Q. Is it in the same location? A. No, I don't think so.

Q. All right, sir. A. Let me show you, this one has no windows, this has windows.

Q. Let me ask you, Mr. Kogod, you remember the
342 building that was there, that is shown in this Exhibit No. 27. A. I remember this building, yes.

Q. And was that building there at the same time that you remember this picture? A. This building here?

Q. Yes. A. Yes, as far as I know, this building was there.

Q. Where was that building which is shown in Exhibit 19-B with respect to this picture in Exhibit No. 27? A. Frankly, I can't add this up, see. This thing in here was right in front of Benning Road.

Q. That is the stockyard office, isn't it, Mr. Kogod? A. Yes.

Q. And right back of the stockyard office, there were two buildings there of the Auth Company? A. Do you have a side picture of this window?

Q. Look at this plat before His Honor, Mr. Kogod. This building here is that building, is it not? A. Yes, sir.

Q. And the building that is shown in the picture, the end building, is that building, isn't it? A. This building here?

Q. Yes. Now, the picture you have in your hand, which is Exhibit No. 19-B, is the corner building, isn't it? A. Yes, this is this building right here.

343 Q. Is that correct, sir? A. Yes, sir.

Q. There are other buildings to the west of that, adjoining it, were there not? A. There was only one building, as far as I recall.

Q. And that building is shown in the picture which is identified as Exhibit 27, isn't it, the building alongside of it is that building, isn't it, sir? A. I can't ever remember seeing that building, if this is the same building and it is a side view, it doesn't seem to add up.

Q. All right, sir. Do you recall the passageway or alley or auxiliary alley or roadway, or the footpath or the cattle path or what have you, that went in front of that building? A. Yes.

Q. What was it? A. This here?

Q. Yes, sir. A. It was a roadway over there.

Q. It was a roadway? A. Yes.

Q. So, there was a roadway at the time this picture was taken? A. No, I can't say this picture—

Q. In your recollection, that land in front of the
344 building? A. And if you had a side picture and
indicate this was the building, I probably could
identify it.

Q. All right, sir. That is the other side, I believe, Mr.
Kogod? A. No, it is the same side, this is the one you just
showed me, it just shows a little bit more of one side.

Q. All right, sir, let's look at this picture. Does that
picture show Exhibit 19-D, is that the same building that is
now occupied by the lumber company? A. Yes, this is the
same building, sure.

Q. Is that building the same building that is in this pic-
ture, Exhibit No. 27? A. It doesn't look it.

Q. Do you recall? A. No, I certainly can't identify this
with this, see, this building in here, this one has a window,
though, this one has a window here, this one don't, it is an
entirely different-looking building.

Q. From your recollection of the locale, is this building
on the same place, the building in Exhibit 19-D, in the same
place as the building in Exhibit No. 27? A. No, I don't
think so.

Q. Do you say that there was or was not, at any time, a
passageway or roadway that ran in front of the building
which is now occupied by the lumber company? A.
345 You mean alongside of it?

Q. Yes, sir. A. Yes, sir.

Q. There was? A. Yes.

Q. How long did that continue? A. As far as I know,
it was there every time I went there.

Q. Every time you went there? A. I don't know when
it started.

Q. Was that also fenced off? A. I didn't recall that to be
fenced off, as a matter of fact when I remember driving in
there, you could park along in here and the fence began
on the other side. I don't remember this particular fence;
now, it might have been there, you know, after all, what I
saw in 1920 or 1921—in 1919 I entered into business for

myself, that was March 10, and you can't recall exact things, especially if you were just coming down there for the purpose of buying meat. So, if that fence was there, I don't recall it. I recall we could pull up and park there, see, so therefore there couldn't have been any fence.

Q. What you were parking in was this area? A. Not according to this fence, you couldn't park there.

Q. Where did you park? A. As I recall, my best recollection was the fence, this fence, wasn't there; I don't know, or this building wasn't there, there is something has taken place since this building has been taken—

Q. I see. The fences you spoke of that were around the driveways, around the roads, or paths, were they the same type of fences that are shown in this picture, Exhibit No. 27? A. Similar, yes.

Q. Similar? A. Yes.

Q. Ran the full length of the roads? A. You mean the full length back?

Q. Yes. A. Yes.

Q. And they were to guide cattle, weren't they? A. That is right.

Q. And do you remember when the roads were used for cattle? A. I remember some of it, yes. I tore them down.

Q. You tore them down? A. Or had them torn down, yes.

Q. The alleyway that goes alongside the east part of Cogito's place, you know what I am speaking? A. Yes.

Q. There were fences on the east side of that alleyway, weren't there? A. Yes.

347 Q. And the fence line was in the same line or relatively the same line where you now have those posts, isn't that right? A. I wouldn't be able to say that.

Q. Approximately? A. I really don't know.

Q. When did you tear them down, Mr. Kogod? A. I didn't tear any of them down, they were knocked over—you mean the original fence?

Q. I am speaking of the fence that you said you tore down, which side of the road was that fence? A. On both sides.

Q. Was there one on the east side? A. Yes.

Q. You know the little posts that are on the east side of that road now, alongside of Mr. Cogito's plant? A. Is there a post?

Q. Well, Mr. Kogod, you tell me. Are there any posts alongside of the east side of the alleyway on the east side of Mr. Cogito's plant? A. I don't remember that.

Q. You don't remember? A. I think I tore them all down.

Q. You know where the sign is that is posted on the Senator Theater parking lot? A. Oh, those little posts way up there?

348 Q. Yes, sir. A. Oh, sure, most of them are down, there is a few still left there.

Q. There are some still left, aren't there? A. Yes, sure, I put them down there.

Q. How long have they been there? A. Oh, I would say some time, it must have been in 1948, maybe 1949.

Q. They have been here since 1948 or 1949, anyhow? A. That is right.

Q. They are on the east side of that alley, aren't they? A. Yes, sure.

Q. In other words, on the far side from Mr. Cogito's plant? A. I originally put them on the other line and then we moved them.

Q. All right. That was back in 1948? A. Yes.

Q. Now, how far along that roadway did you put those posts? A. Originally?

Q. Well—— A. Originally, I put them on the building line.

Q. On the building line? A. That is right and the sign was also on the building line.

349 Q. And the sign is down and that is moved over to the far side, is that correct? A. Yes.

Q. Now, the posts are over on the far side, is that correct? A. That is right.

Q. How long have those posts been there? A. Well, it was either put up in 1948 or 1949.

Q. How many are there? A. How many posts?

Q. Yes. A. Oh, we put about 30 or 40, I don't know how many are left there.

Q. Were there any posts in that line, or a fence in the line where those posts now are, before you put those present posts there? A. You mean recently?

Q. No, since you bought the place, was there a fence line? A. Not a line, no.

Q. Where was the fence with respect to those posts? A. You see, when you attorneys reached an agreement——

Q. No, just a second—— A. I want to tell you what happened.

Mr. Wheatley, Jr.: Well, I object. I ask the witness to answer my question.

The Court: Answer this question first. and then you can explain.

The Witness: All right, what is it you want me to answer?

By Mr. Wheatley, Jr.:

Q. Where was the fence that was on the east side of that alleyway? A. On the edge of where the cobblestones were.

Q. On the edge of the cobblestones? A. That is right.

Q. Now, with respect to the posts that are now there—— A. They are not on the edge of the cobblestone, because they are a given feet away that you and Mr. Denit agreed upon for me to go back.

Q. That is 25 feet away, isn't it? A. I imagine that is what it was, I don't really recall.

Q. Is it or isn't it? A. I am not sure, whatever you and Mr. Denit agreed upon, that is what it is.

Q. Do you know how far those posts are? A. They are either 25 or 30.

Q. Do you know how far the fence line was before you took it down? A. Well, my estimate would be they were probably 10, 12 or 15 feet, I don't know.

351 Q. Now, the flagstone paving was 18 feet wide, wasn't it? A. I doubt it.

Q. Well, the surveyor's office showed it was 18 feet. Do you say that is a mistake or was it more or less? A. I am not sure, it may be right.

Q. Now, where was the fence, Mr. Kogod? A. Right on the edge.

Q. On the edge of that? A. That is right.

Q. How far did it go?

The Court: On the eastern edge of that?

The Witness: Yes, sir.

By Mr. Wheatley, Jr.:

Q. How far back did it go? A. It went back to those sheds, to those bins.

Q. To the end of Cogito's property, didn't it? A. I don't remember it going that far back, we had some buildings back there.

Q. Yes, you had some buildings back there. You know where the end of Cogito's property is, don't you? A. We had some buildings on this side of it.

Q. Yes, sir. Did the fence go back as far as the end of Cogito's property? A. No, I don't think so.

Q. How far back? A. I think it went far back as
352 our property was.

Q. Your property surrounds Mr. Cogito's property, according to you? A. We had some buildings back there, see.

Q. Do you have a sketch showing your buildings, Mr. Kogod? A. I don't know, you mean the old buildings?

Q. The buildings you bought. A. It may be on your sketch, I don't know, I am not sure—just a minute, I will see. We had a building, some of them aren't on here, I don't think it shows—right in here, maybe this is the building, it maybe came this far, I don't know. It came as far back as one of these buildings here (indicating).

Q. You don't know whether it ran the full length of Mr. Cogito's property, but at least as far as his present iron gates are, didn't it? A. Approximately.

Q. Now, the building at the south end of Mr. Cogito's property, the new building—— A. The back building?

Q. The back building. A. Yes.

Q. Do you remember when that was built? A. Yes, sure.

Q. Did the fence go back that far? A. No, sir.

353 Q. Now, do you remember after the viaduct was built, that you had to turn down and make a sharp right "U" turn and come back down Benning Road to get into the plant? A. Yes.

Q. And you said that there were two roads there, one was the road that you took going in alongside of the railroad track, going into the Loeffler place, is that correct? A. That was the road, yes, sir.

Q. That was the road, and then a little nearer Anacostia Road and Minnesota Avenue there was a cattle path, is that right? A. Well, there was a fence there, a closed fence with a gate that you entered in there, see, that you could enter into it to unload cattle, I imagine, or whatever you wanted to do with it.

Q. When was that, Mr. Kogod? A. What do you mean, when was that?

Q. What period of time was that you say after the viaduct was built, the fence was right along Benning Road, is that right? A. As far as I know, it was always there.

Q. Well, your recollection ran from—— A. Oh, you mean when I first saw it?

Q. Yes. A. Well, I can't say when I first saw it, it
354 may be some time in the 20's or somewhere around that time.

Q. The 30's? A. Yes, well, I stopped going there in the 30's, I sold my business in 1930 in March, in fact, I sold it earlier than that and I turned it over in March, so I didn't have any occasion to go there any more after that until I bought the property.

Q. Yes, sir. Now, do you remember, you say that the Benning Road side was all closed with fencing, is that right?

A. That is right.

Q. After the viaduct was built? A. Yes.

Q. And do you remember this stockyard office that we have been talking about? A. Yes.

Q. And do you remember the path or passageway or cattle yards that went down on the east side of that yard?

A. Yes.

Q. That stockyard office, you remember that? A. Sure.

Q. I show you a picture, Mr. Kogod, and ask you if you can see in that picture anything that reminds you of the stockyard office with connection with the viaduct and the main alley that ran alongside of the stockyard office. For

your information, I will point it out to you, so you can
355 tell me whether or not it refreshes your recollection or not? A. Yes, I think this is a picture of my property that I own.

Q. That is right, sir. You see on there, do you not, what was the stockyard office? A. Yes.

Q. And where is that, sir? A. Right here, that is the front part.

Q. And do you see on there the Benning viaduct? A. Sure, here it is.

Q. Now, where was the right-of-way that you concede Mr. Cogito has, alongside of the railroad tracks? A. It is not on this picture.

Q. Not on this picture? A. No.

Q. It would be nearer you than the picture shows? A. Yes.

Q. Is there shown on that picture the roadway we have been calling the alleyway? A. Yes.

Q. Where is that, sir? A. Right in here.

Q. All right, sir. Now, we want to——

Mr. Wheatley, Jr.: This is Exhibit No. 15, if Your Honor please, which has been offered in evidence.

356 By Mr. Wheatley, Jr.:

Q. Would you show that to the Judge and show me where the alleyway is shown on that picture, Mr. Kogod? A. I don't know when this picture was taken, but this is the alley he is talking about (indicating). I don't know what it was.

Q. That is the road that goes in from Benning Road?

A. Yes, this is Benning Road.

Q. And the stockyard office is where His Honor has his right thumb, isn't it?

Mr. Wheatley, Jr.: That picture, Your Honor please, introduced in evidence, is from the Corporation Counsel's Office, District of Columbia, 1939.

The Court: Yes. Is it your testimony that formerly there was a gate here?

The Witness: Yes, sir.

The Court: And a fence on each side of this alley?

The Witness: That is right.

The Court: All right, sir.

By Mr. Wheatley, Jr.:

Q. Now, Mr. Kogod, is this the way the property looked when you took the title? A. Yes.

Q. And you made no changes to that road bed between the time you took the title and the time that Mr.
357 Mannar made that survey, did you, in 1943? A. Well, I tore down that shed.

Q. You tore down the shed, yes. A. Yes.

Q. But it then wasn't necessary for you to tear down the fence, because the fence wasn't there, was it? A. Well, there was a fence there, I don't remember it was right on the road; there were fences all along there.

Q. Well, point out to His Honor where these fences were that you say were all along that road, particularly Benning Road, was there a fence all along Benning Road? A. I think it was partially tore down, Your Honor, there is the fence right there, right alongside of it you can see the evidence of the fence and there was some fence about there;

I don't know, it isn't very visible, some of it was dilapidated, this land hadn't been used by anybody, it was laying there as a ghost town for a number of years. This was the fence right there, you can see a piece of it right there, see, alongside of this shed here, there was a fence along in here. Now, how far it came down, I don't remember.

Q. Wasn't that fence that you are pointing out to His Honor, Mr. Kogod, rather the fence around the stockyard pen, it is on a line with the stockyard shed looking at that stockyard shed from that line, isn't that the fence? A. You see, this was way up in here, you see the front part of this and alongside of it on this side, you see this turning
358 over, there is the porch, you can only see a portion of it and this fence over here protrudes further than this porch.

Q. Mr. Kogod, I don't want to interrupt you, but this roadway that comes on the easterly side of the telephone pole and fire hydrant on Exhibit No. 15 and runs past the stockyard shed, is the same entrance as shown in plat plan Exhibit No. 3 and which we claim is the alley, is that right? A. Probably so, but there is the fence.

Q. And that is the way it was when you acquired title? A. I presume this picture is correct.

Q. That is your recollection, too, isn't it, Mr. Kogod? A. As far as I can remember, we had a lot of fences down there all over the land, it is very difficult to picture everything, I didn't have a picture taken of it.

Q. Please look again at Exhibit No. 27 and when you speak of the fence that ran along the east line of the alleyway, that ran back with Mr. Cogito's property line, was it the same kind of a fence as is shown in this picture, Exhibit No. 27? A. Which fence are you talking about now?

Q. The fence that ran along the east side of the alley on the east side of Mr. Cogito's property. A. To my recollection, it was that kind of fence.

Q. And that is the kind of fence you tore down? A. That is right.

Q. It was a fence to close stock, wasn't it? A. That is right.

359 Q. And that bound the alley in so that the access was permitted from the stock pens into the alley and herded the cattle bound through the alleyway, isn't that right? A. The purpose of the fence was to keep the cattle enclosed.

Q. And the fences were on the far side of the alley, weren't they? A. Well, there was one on both sides.

Q. One on both sides, and that fence that was on the east side was beyond the point of the flagstones? A. The east side was, and the other was probably either on a building line or somewhere along there.

Q. And that permitted a free access of approximately 18 to 20 or 25 feet between the fences along that alley? A. I don't think they were that wide.

Q. How wide were they? A. I would say around 12 feet, for cattle.

Q. Did that fence run all the way out to Benning Road? A. I think it did, I just don't remember when, whether it was the time I bought it; the fence went all the way out to Benning Road, all right, I remember seeing it, but I don't remember whether it was that way or not when I bought it; evidently it wasn't when I bought it, according to the picture.

Q. This is the best evidence it wasn't, when you
360 bought it? A. My recollection is this—

Q. Your recollection now is the fence didn't go out to Benning Road? A. This picture was taken in 1939, it was the year before I bought it, if this was a true picture at that time, then the fence didn't go quite all the way across.

Q. And that is your best recollection now, isn't it? A. We tore down some fences and I am a little bit confused about it.

Q. You are confused about what, the fences you tore down? A. No, I know we tore them down, but I am confused about how far they went.

Q. Are you just as confused about the fence you were talking to Mr. Cogito about? A. No, I am not confused about it, that was the fence he built, a brand, new fence.

Q. Where was the fence he built? A. When I came out there the first time, I met Mr. Cogito, he had built a fence across this way, it was in place across this way and was returning here. You remember that, Mr. Cogito.

Q. The Judge has got to see this, Mr. Kogod. You point out to him where you say this fence was.

The Court: Can you put it on here? What fence did Mr. Cogito build?

The Witness: He built a brand, new fence out of
361 lumber on two by fours and nailed them on.

The Court: Where was it on this plat?

The Witness: He started it on this side right along in here, about half-way this road down here, and built it across this way. When I came there, this fence was built all the way this way.

By Mr. Wheatley, Jr.:

Q. You mean he made an alleyway here with a fence on each side? A. He put a fence on my property, a solid fence.

Q. And that was over the area we now claim is the auxiliary alley? A. I don't know whether you are claiming this alley or not, the only alley that you are claiming that I had any information on, was this one.

Q. The only alley you understood was in dispute was the one from Benning Road along the complete eastern side? A. Isn't that what you are contending?

Q. Let me ask you the questions. Is it your understanding the only alley in dispute is the one that ran from Benning Road easterly on the easterly side of Mr. Cogito's plant? A. When is that question up, is it up now?

Q. I am asking you now, sir—— A. I have never Mr. Cogito at no time contend he had a right-of-way
362 over here.

The Court: You mean here?

The Witness: No, this one, never heard of him when he

first bought the real estate, he thought he had a right-of-way this way and this way, and that is where he put this fence up. That was before he took title. After he took title, he told me he found out he didn't have the right-of-way but he asked for my permission, to be helpful as much as I could, and he had a platform in here and he wanted to bring some material in here for some construction in here, for which he wanted to use my property over. I tried to be a good neighbor and help him out.

By Mr. Wheatley, Jr.:

Q. When you first met him, you told him you had him tied in, didn't you? A. That is correct.

Q. And how was he going to get out, when you owned all the ground around him, didn't you? A. That is right.

Q. At that time, this survey showed you had all the ground around him? A. That is correct.

Q. And you now find out he has a right-of-way? A. Not now, I found out when he took title.

Q. You know he does have a right-of-way? A. Twenty-five feet, yes, we conceded that right-away and that settled the question.

363 Q. Now, from the time he acquired his property, who has occupied the buildings which face the property, which is now rented by you as a lumber yard? A. Nobody for many years, it has just recently been fixed up.

Q. Do you remember whether anyone has occupied it, where the lumber office is? A. For many years, not occupied at all.

Q. How long has it been occupied that you know of? A. I don't know, I imagine about two or three years.

Q. By whom, Mr. Kogod? A. Well, I don't know.

Q. You are not there very frequently, yourself? A. Not on his property, I have no business on his property.

Q. Your business is not over in that area, is it? A. Oh, yes, I have a great deal of business in that area.

Q. Are you there frequently on the ground? A. Yes, sure

Q. Do you know who occupies the property that faces that lumber yard, which is there now? A. The lumber yard?

Q. Yes. A. Yes, I know who is occupying part of it
364 now, I understand he has a downstairs and somebody else the upsairs.

Q. Who has the downstairs? A. This lumberman, I don't remember his name.

Q. How long has he been there? A. Two or three years.

Q. And who was there ahead of him? A. I don't remember anybody being ahead of him there. I don't think it was used ahead of him.

Q. You don't have any recollection of anyone using it before that? A. No.

Q. Do you know his other properties in that area? A. Well, the first property that I remember Mr. Cogito fixed up, is the one in back.

Q. Who occupied that? A. I couldn't name the tenant now.

Q. It has been occupied by various tenants, hasn't it? A. Yes, as far as I know, maybe Mr. Cogito was running it himself, I don't know.

Q. All right, sir. It has been occupied? A. The back part, yes.

Q. And I think you told us that you had never seen anyone use the alleyway that ran along the east side of Mr. Cogito's property? A. That is correct.

365 Q. Do you mean that? A. Yes, sure.

Q. You have never seen it? A. As far as I recall, you see, for a long while, there wasn't any entrance or exit to his, until he put the gates in and fixed it up.

Q. Since the gates have been up, have you seen anybody use it? A. The only time I have ever seen them come over it, is over my property, just clear across. I have never seen them come in through any particular direction the way this plan shows, they just came over Minnesota Avenue, go right across my ground into his land.

Q. And I think, Mr. Kogod, you said on your direct examination, that you wouldn't have any argument with Mr. Cogito?

The Court: Wouldn't have any what?

By Mr. Wheatley, Jr.:

Q. Any argument with Mr. Cogito over the use of the alley by Mr. Cogito, that your only arguments were over the use of your parking lot, is that correct? A. The question——

Q. Wait a minute, did you say that on your direct examination? A. No, sir, not the way you say it.

366 Q. I took down that you said you had no argument over the alley until recently, but the only argument was over the use of the areaways which you had improved for a parking lot. Do you remember saying that? A. You see, Mr. Cogito conceded that he wasn't going to use the alleyway and that he had no intention of using that part, and the only thing is that somebody made a mistake in putting those gates up and he was going to keep them locked. There wasn't any question of using an alley or not using it, at all.

Q. When was that conversation? A. That was in 1946.

Q. The conversation—— A. Oh, you mean when he first conceded to me that he didn't have any projection over our ground, was when he took title. You see, before he took title he had a conception that he had a right of way.

Q. Now, wait a minute, Mr. Kogod. You just answer my question. When was it that he told you he was not going to use this alley? A. That was in 1943.

Q. And did he thereafter use the alley? A. No, well, he used it when he was building, by permission, yes.

Q. Did he use it other times? A. Well, yes, sure.

367 Q. Just tell us how much this alley has been used.

A. That alley has been used very little, if any, see, it has been used very little. They have been using my ground, going over my ground.

Q. What did you block it off for, Mr. Kogod? A. I first blocked it off when Mr. Cogito started building a fence around my property.

Q. When and where was that, that you blocked it off?

A. That was the latter part of 1942, as I recall, maybe early 1943.

Q. What did you do to block it off? A. Well, there was a natural gate there when that was knocked off.

Q. Where was the natural gate? A. It was across that culvert, that you call a culvert, there was a post right against his building, see, right on my property but against his building, that swung out and was closed up.

Q. That would close off the area in front of it? Let me see if I can't show that to you on this picture, Mr. Kogod. Having reference to Exhibit No. 27, wasn't that the gate that closed over this alleyway on the other side, on the east side?

A. I don't think you can show it very well in this
368 picture, because this picture is very confusing. You have another picture there, I can show it to you better.

Q. All right, which one is that, Mr. Kogod? A. Give them to me, please, your pictures, I will show them to you. None of these show it. You just had that picture a little while ago.

Q. What kind of picture is it? A. It shows a culvert.

The Court: You will have to find the picture between now and 10 o'clock tomorrow morning, because I have some people in the office now who have to have attention.

The Court would like to know approximately how long this case will take, because the Assignment Commissioner is asking me about a case tomorrow. About how long will your case take, sir?

* * * * *

369

Washington, D. C.,
April 12, 1951.

* * * * *

370 Q. Mr. Kogod, you had yesterday presented a survey sheet which was identified as Defendant's Exhibit No. 1, which was obtained by you in 1941. Did you give the Surveyor's Office the description from which that survey was made? A. I don't think I did it personally, I think that the description came from the contract of purchase through the title company.

Q. Through the title company? A. It was described in my contract submitted for search of title and they naturally ordered the title.

Q. Mr. Kogod the survey sheet that was obtained shows only the outlines of your deed, doesn't it? A. Outlines of my property, yes.

Q. As shown by your deed? A. Yes, I think so.

Q. And it does not show the types of walls or wall constructions or breaks in walls, or the roadways or alleys that actually were on the location, does it? A. No,
371 sir.

Q. And, as a matter of fact, you have now discovered that a right of way by grant exists over your property, which is not shown in that survey, is that correct?

The Court: Did you say by grant?

Mr. Wheatley, Jr.: I said by grant, but there is a right of way over his property.

The Witness: See, I bought the land as acreage, all I was interested was to get as much land as I bought, the contents and material that was on the property was of no importance.

By Mr. Wheatley, Jr.:

Q. Mr. Kogod, you told His Honor yesterday that you conceded that Mr. Cogito has a right of way leading into his property from the Benning Road at the northwesterly edge of your property, is that correct, sir?

The Court: There wasn't any discussion as to how he reached that conclusion or upon what it was based, it was just simply conceded, that is all.

Mr. Wheatley, Jr.: Yes, Your Honor.

By Mr. Wheatley, Jr.:

Q. That right of way, Mr. Kogod, is in the northwesterly section of your property, is that right? A. Mr. Cogito claimed some right of ways. In our dispute and settlement, conclusions were found he had a 25-foot right
372 of way with black macadam on the far end of the property, that concluded that dispute and settled it at that time.

Q. In other words, that runs from Benning Road into his property at the westerly end of your property line, is that correct? A. That is correct.

Q. Now, that isn't shown in the survey, is it? A. No, sir.

Q. Now, when did you first hear that any claim was made by Mr. Cogito as to any right of way or alley across your property? A. Well, Mr. Cogito, my first meeting with Mr. Cogito was at the time he was building that fence, and at that time he claimed some right of ways and he told me that he owned the Gobel property by contract, but he didn't have title to it yet. And at that time the dispute started and when he received his title from the title company, he claimed the 25-foot right of way and admitted any other claims, or the title company probably told him that he had no other right of ways and we negotiated on that and we had conceded the 25 feet.

Q. When was that, that you first heard from him? A. I think it was the early part of 1943.

Q. Have you ever heard from Mr. Cogito prior to that, that he claimed right of way over your property? A. Yes.

373 Q. Where and when did you get that information?

A. That was at the time he was building the fence.

Q. What date was that? A. I didn't mark the date down, but in the latter part of 1942.

Q. And he claimed he had a right of way into his property? A. That is right.

Q. Was that limited only to the 25-foot right of way?

The Court: He testified yesterday that the plaintiff claimed his principal right of way was just a dispute, but afterwards, said he was mistaken; that is what he testified to, there is no use going over that again.

By Mr. Wheatley, Jr.:

Q. When was it, Mr. Kogod, that you say there was a withdrawal of that claim by Mr. Cogito as to the easement?

A. Well, it was after, I imagine, Mr. Cogito got title to the property and when he tore the fence down.

Q. When was that? A. It was the early part of 1943, about the time he got his title.

Q. Did you say there was an agreement? A. Well, he had conceded to me in my discussions with him afterwards and he asked me to give him some cooperation and to let him use some of my land, which I wasn't using at
374 that time.

Q. Was anyone else present then? A. At that particular conversation or conversations, I don't remember.

Q. Sir? A. I don't remember.

Q. You don't remember whether anyone was present when he withdrew this claim to this easement? A. I don't remember, no.

The Court: The Court thinks that is a legal conclusion, whether he withdrew or not. The Court thinks the situation, as far as the testimony has progressed, is this: The plaintiff thought he had this right of way which is the principal one in dispute, the one from Benning Road east of the railroad, and then he afterwards thought he didn't have it. There is no evidence that he ever renounced or gave up any right that he had. The evidence is that he just had been advised that he didn't own it, that is the evidence, he was advised he didn't own it. There is no evidence he ever abandoned any right he had.

By Mr. Wheatley, Jr.:

Mr. Wheatley, Jr.: Thank you, sir.

Q. Now, Mr. Kogod, do you remember you had the ground graded sometime, with a shovel operation? A. Oh, yes.

375 Q. When was that? A. That was in 1941.

Q. And how long did that grading operation continue? A. Well, we have built many times, and each time you build, you grade.

Q. Do you remember a discussion you had with Mr. Cogito about the shovel coming into the alleyway he claimed was the alley? A. You mean by shovel?

Q. Yes, sir. A. Well, we were excavating some land in the back and he called me one day and I met him out there and he complained that the man that was taking the land, the surplus dirt that I didn't need, an excavating contractor needed some dirt and got in touch with me and he wanted me to give him a contract on taking off some dirt, and we negotiated and finally made a deal where I gave him \$500 to take off the dirt on the far end of my property against the alley. Mr. Cogito called me and said that this man was scooping the land from Minnesota Avenue towards his property with a slope and he was concerned about the drain or water condition that would be created from that property, that may get on his property.

Q. Mr. Kogod, when were the fire hydrants removed, do you remember? A. Well, the fire hydrant, you mean
376 the water hydrant, don't you?

Q. Yes, water fire hydrant. A. The water hydrants on my property were removed in 1941.

Q. Now, Mr. Kogod, the alley as it exists today, the alley alongside the eastern side of the property is the same way as it was before February 4, 1949, when you put those obstructions in, isn't it?

The Court: When he put up what, sir?

By Mr. Wheatley, Jr.:

Q. The alley as it exists today is the same as it was before February 4, 1949, when the obstructions were placed there by the defendants, that was the stipulation. A. Well, I explained it to you and the Court yesterday, that when we blocked off, so we wouldn't get this traffic, we put about 40 posts right on a building line and then removed them easterly back.

Q. Mr. Kogod, just one second, the alley as it is now is the way it was before February 4, 1949, is that correct, sir?

A. Yes.

Q. Thank you, that is all.

* * * * *

377 Thereupon **Thomas T. Keane** was called as a witness by the defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Denit:

* * * * *

Q. What business are you engaged in? A. Hotel supply and wholesale meats.

* * * * *

Q. How long have you been in the hotel supply business? A. Since 1929.

Q. Prior to that, what business were you engaged in? A. Beginning in 1920, with the T. T. Keane Company and the Keane Provision Company.

Q. Did you ever have any contact with the abbatoir, 378 the Washington Abbatoir? A. After the purchase of it by Gobel in July of 1928, I was appointed supervisor August 1, 1929.

Q. Prior to that time, had you known of the abbatoir? A. I had known of it since I was about six or seven years old.

Q. Take you back to about what date? A. 1906, 1907.

Q. Your father was the same Michael A. Keane who, at one time, was one of the operators of the abbatoir? A. That is correct.

Q. Did you ever go there with your father from time to time? A. On Sundays, it was somewhat of a ritual with the family, after church he always went out to look at the live stock that would be killed the next day. He always took me with him.

Q. You were employed by Gobel in 1928? A. Yes.

Q. In what capacity? A. As supervisor of the abbatoir.

Q. That is the same Gobel Company known as Adolf Gobel, Inc., is it not? A. That is correct.

Q. Now, in addition to the abbatoir, were you familiar with the stockyards surrounding the abbatoir?

A. I was very familiar with it.

Q. And the operation of those yards? A. I was.

Q. Did you ever have any dealings with the stockyard operators? A. As supervisor of the abbatoir, they would bring the different types of animals, whether it be lambs or hogs or cattle, under my direction, in the routine manner in which they were killed, I would issue the orders to them.

Q. You remained at the abbatoir in the employ of Adolf Gobel until what date? A. November 1, 1928.

Q. During the period of your employment, were you there daily when the abbatoir was in operation? A. Every day the abbatoir operated.

The Court: When did you say you started your employment, sir?

The Witness With Gobel?

The Court: Yes, sir.

The Witness: When they bought the company out, July 18, I think the date was 1928.

The Court: Maybe I misunderstood you, but I understood you to say you terminated your employment at that time.

The Witness: No, I didn't terminate my employment until March 15, 1929.

The Court: All right, sir.

By Mr. Denit:

Q. Did you leave the abbatoir before March 15, 1929? A. Yes, I was sent back down to the Keane Provision Branch, November 1, 1928.

Q. From the time you first had occasion to observe the operations of the stockyards and the abbatoir in 1906 and 1907, down to the time you left the abbatoir and your employment with Gobel in 1928, did you observe the way the stockyard was operated so far as the admission of cattle and livestock? A. Yes, I knew all about the operation of it.

Q. I show you what has been admitted in evidence here as a plot plan and ask you to refer to that, please, sir, and indicate to us the property of the stockyards during the time you were familiar with it.

The Court: Is that the same as this one?

Mr. Denit: The same as you have before you, yes, sir.

The Witness: The stockyards own all of the property from the corner, I will correct that, the abbatoir took up this space across here which was the Loeffler department here in the front, and the abbatoir and all that operation took up the balance of it over to where it reads here "Garage and animal storage," the section in there of about two acres.

By Mr. Denit:

381 Q. Is all of the remaining property shown on this plat, that is the property to the north, the property to the east, and the property to the south, operated by the stockyards? A. It was.

Q. Now, Mr. Keane —

The Court: Show me that, because I can't see what you are talking about. What property is it you say was owned by Gobel?

Mr. Denit: All of the property to the north, all of the property to the east, and property to the south, was owned by the stockyards. This property in here was owned and operated by the abbatoir.

The Court: The abbatoir had no connection with the Gobel crowd?

Mr. Denit: The Gobel crowd acquired the abbatoir by various deeds.

The Court: All right. In other words, they owned all of it, that is what you mean.

The Witness: Who owned it all, sir?

The Court: The Gobel people.

The Witness: No, the Gobel people owned only this space occupied by the abbatoir.

The Court: I understood Mr. Denit to say that it acquired this abbatoir property.

The Witness: They did, sir.

382 The Court: Then, they owned it all.

The Witness: All of the abbatoir?

The Court: Which didn't they own, sir, please?

The Witness: They didn't own this property out here, nor did they own this property across through here, nor this property up here. They only owned the two acres that the buildings sat on pertaining to the abbatoir.

The Court: All right, sir.

By Mr. Denit:

Q. Now, Mr. Keane, there was a 25-foot paved roadway leading from Benning Road into the property on the north of this area here, was there not? A. Twenty-five foot—

Q. Leading from Benning Road into the Loeffler property? A. Into the Loeffler and abbatoir property, that is on the east side parallel with the railroad tracks.

Q. Now, was there a passageway or alley into the abbatoir east of that paved road? A. Yes, this was the main entrance here.

Q. Now, will you describe that entrance and that alleyway, as you remember? A. As you turn into the main stockyard entrance?

Mr. Wheatley, Jr.: If the Court please, will you just put that down so the Court can see it, please?

The Witness: This is Benning Road before the
 383 bridge was built or afterwards, all live animals
 brought in were brought into this driveway here,
 that came in by truck or wagon. This office shown here
 was right up close to this main entrance here. The hog
 pens—there was a double gate across there, right at the
 north side of the hog pens, those gates having been used
 primarily for hogs going into this pen, were only about
 four feet high. They were double, heavy gates, reinforced
 inside, because they had quite a swing from both sides
 to close this off here.

By Mr. Denit:

Q. By "this," you mean the passageway? A. Close the
 passageway off. There was another set of gates here, the
 purpose of this was when hogs were brought in, this big
 door there at the hog pens where the truck or whatever
 it was was backed in, the hogs were unloaded, should any
 of them get loose, they couldn't get out to the north nor
 could they get out to the south.

The Court: On account of the gate, you mean?

The Witness: On account of the gates, sir. Handling
 livestock, Your Honor, you have got to have gates, this
 whole place is gates. These gates across here were the
 main gates and the main entrance to the stockyards. Those
 gates were locked at the end of the day and were kept
 locked until the stockyards opened in the morning. Then
 here was this other pair of gates——

384 By Mr. Denit:

Q. By "here," you mean approximately where? A.
 Right this lane coming in front of the Loeffler building
 where all the animals unloaded from the railroad cars,
 came over here across this bridge and along this front of
 the Loeffler building.

The Court: Is it your testimony that that particular
 alley or lane was only used by the predecessors in title of
 the defendant, is that your testimony?

The Witness: Predecessors of the defendant?

Mr. Denit: Mr. Kogod.

The Witness: It was only used by the stockyards, other than what traffic had to come over here to remove acids from the plant, fertilizer from the plant that was sold for delivery by truck.

The Court: Well, was the fertilizer and your acids and the pens, all owned by the same people?

The Witness: No, sir, the fertilizer and acids were owned by the plant.

The Court: Your testimony is that the alley was used by anybody who had a business place in that territory, is it?

The Witness: My testimony is that that was only used for the bringing in of livestock for the stockyards or business pertaining entirely to this plant.

The Court: They were the only people that had
385 any business in there, weren't they?

The Witness: That is all.

The Court: All right, sir.

By Mr. Denit:

Q. Now, you have described two sets of gates. Were there other gates in that alleyway? A. Another set of gates swung from this corner of the building here, they were high gates, and they were high gates because if they brought in hogs, this gate was closed, this gate was swung open, the hogs would come through and go down here and into the hog pen. If they were lambs or sheep or cattle, this gate was closed across here, this gate was open. There was a gate just about here.

Q. About here, would be about the center of the Loeffler building? A. Approximately the center, a short distance up here, giving room enough for trucks to unload in that section right in there, and if they were cattle, they came on up here and went up to the cattle pens. If they were lambs or sheep, this gate was closed here and the lambs went down this driveway here down to these sheep pens; continuing on, as the cattle would come up here, if the

cattle were going directly into the slaughtering plant, there was a gate across here that would stop them from going further up in the yards, and a gate across here and
 386 the animals would be driven through this narrow passageway that went underneath there, direct into the abbatoir to be killed.

The Court: I don't know whether either side wants to go to the Court of Appeals, but if you do, I don't know what kind of a record you have got. It says here and there and there, and so on, there is no way in the world that the reporter can know what you were talking about.

By Mr. Denit:

Q. The third gate is about the center of the Loeffler building, that would be the east side of the Loeffler building, is that correct? A. That is correct.

Q. Where was the fourth gate? A. The fourth gate is this gate here.

Q. Approximately located where? A. Right at the corner, at the south corner of the abbatoir building.

Q. That is the building designated on this plot plan as the abbatoir? A. As abbatoir.

Q. Were there other gates in that passageway? A. There was the other gate about 50 feet beyond that for holding animals to drive them into the abbatoir, and there is another gate at the end of this passageway or alleyway at the extreme end of it, that was locked and kept
 locked.

387 The Court: Is it my understanding that the abbatoir and stockyards were not owned by the same people, or that they were owned by the same people?

The Witness: Separate entirely.

The Court: All right.

By Mr. Denit:

Q. Now, the gate at the extreme end of the passageway, you say, was locked and kept locked all the time? A. As far as I know, I never knew of it being open.

Q. How about all the rest of the gates you have described, were they left open or closed at the end of the day?

A. This gate here, the first gate you come to on the entrance to this passageway was locked the end of the day and kept locked until the next morning, and the yards opened at 6 or 7 o'clock, whatever time they had to be.

Q. When were they closed? A. They were closed about 4 or 5 o'clock in the evening.

Q. I show you a photograph which has been marked Defendant's Exhibit No. A-8 and direct your attention to the building. Can you identify that building? A. Yes, that is the old Loeffler department building.

Q. Were any of these gates that you have described, attached to that building? A. Yes, there was a gate at the far corner and about half way up, in fact, there
388 is the hinge right there in the picture, you can still see it.

Q. Have you seen that hinge lately? A. Yes, I saw it last Friday.

Q. Do you know, Mr. Keane, when the abbatoir ceased to operate? A. The early part of 1932, the best of my knowledge.

Q. And there was a fire at the abbatoir sometime after it ceased operation, was there not? A. Yes.

Q. Do you recall approximately when? A. Around 1934 or 1935, I don't remember the exact time.

Q. Now, you said these gates on this passageway were locked and kept locked. Who kept the keys to them? A. The stockyard company, as they kept the keys to all pens.

Q. As a result of the fire, what was the condition of the abbatoir, do you know? A. From a distance of about 300 feet, that was as close as I bothered getting to it, in fact, I examined it from the bridge, that was gutted out.

* * * * *

Q. During the time you are familiar with the operation of the stockyards, do you know of any instance when
389 the officials of the yards prevented the use of this

alleyway or passageway down to the abbatoir? A. I recall one incident when the stockyards company raised the price of feed to the animals, this happened to be hay for cattle, and my father purchased a load of it and sent it out there to feed the animals which his company owned, and Mr. Dilly, who was head of the yards, stopped us immediately.

* * * * *

Q. Who was Mr. Dilly, what connection did he have with the stockyards? A. He was president of the stockyards company and, to the best of my knowledge, controlled it.

Q. You say he stopped your father from bringing the hay in there?

* * * * *

390 Q. Were you there at the time? A. I was.
Mr. Denit: You may cross-examine.

Cross-Examination

By Mr. Wheatley, Jr.:

Q. Who did you say you worked for? A. What, now?

Q. No, at the time the Gobel Company—— A. What time?

Q. In 1928. A. In 1928, I worked for the Keane-Loeffler branch of the Gobel Company, it was only controlled by Gobel.

Q. How long did you work for them? A. From July, 1928, until March 15, 1929.

Q. Now, the Keane-Loeffler Company changed its name to the Gobel-Loeffler Company, didn't it, and then later changed its name to Adolf Gobel, Inc., isn't that right?

A. They changed the name from Keane-Loeffler to Gobel.

391 Q. Gobel-Loeffler, and then to Adolf Gobel, Incorporated, didn't they? A. I recall the Adolf Gobel, Inc., I don't remember that change.

Q. It was the same interests, Keane-Loeffler, Keane-Gobel, and then became Keane-Gobel? A. Never Keane-Gobel that I know of.

Q. Who was president of Adolf Gobel, Inc? A. Frank——

Q. Did you know a man named Frank Swiger, who was president of Adolf Gobel? A. Of the Washington Department?

Q. I show you a paper filed December, 1936, bearing the signature of E. D. Swiger as President of Adolf Gobel, Inc. Was he the President, that you ever knew of? A. Not when I was there.

* * * * *

Thereupon, **Louis W Gray**, was called as a witness by the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

392 Q. Did you ever work at the Union Stockyards?

A. Yes, sir.

Q. During what period of time? A. Around 23 years.

Q. Beginning when and ending when? A. I would say around 1909 and 1931 or 1932.

Q. During that period, were you working for the
393 stockyard company or for the abbatoir? A. I worked for all three of them, but I remained the same place.

The Court: Worked for what?

The Witness: All three, different firms, but they are at the same place.

By Mr. Denit:

Q. You mean by all three, either the Union Stockyard or the Washington Abbatoir, or what other concern? A. Adolf Gobel.

Q. Adolf Gobel. I take it you are familiar with the layout of the stockyard and the abbatoir? A. Yes, sir.

Q. During this 23-year period, what sort of work did you do out there? A. I purchased the livestock.

Q. And that would be livestock brought in by farmers from the neighboring community? A. Yes, sir.

Q. I show you a plot plan which has been introduced in evidence here and ask you if you will point out to the Judge the way by which the livestock was brought to the abbatoir, as you purchased it from the farmers.

* * * * *

The Court: This is the Benning Road, right here.

The Witness: Benning Road—now, where is the
394 front gate of the stockyard, then I can tell you. Is this Benning Road right here?

By Mr. Denit:

Q. Here is the B. & O. Railroad tracks, up here. Was there an entrance to the plant from Benning Road near the railroad tracks? A. Yes, sir.

Q. Point that out to us. A. This way.

Q. Running alongside of the railroad? A. That is right.

Q. Now, was there an entrance to the stockyard at some other point? A. The main entrance.

Q. Where was that? A. That was right in front of the stockyard office.

Q. Here is the stockyard office, indicated here. A. Yes, sir.

Q. Now, was it east of the stockyard office? A. East, that is right.

Q. Is this the roadway that is marked there, here are the hog pens below. A. Oh, this is the hog pens, that is the alley.

Q. That is the alley. Is that the alley that live-
395 stock came in there? A. Yes, sir.

Q. All right, will you tell the Judge whether there were any gates in that alley? A. Yes, sir.

Q. Point them out to him, as nearly as you can. A. Here is a hog pen, right here.

Q. No, that is the field office. Here is the hog pen below that. A. Hog pen, well—

Mr. Wheatley, Jr.: Your Honor——

Mr. Denit: I think we have a perfect right to point out to him what is printed on the paper.

The Witness: Here is the hog pen here, this was the office over here, there was a gate right there, right there. Now farther up, there was a little bridge right here.

Mr. Denit: You have got the wrong place.

The Court: Wait a minute, let him do it.

The Witness: And on the south end of the hog pen, there was another gate and here comes the little bridge right here where the creek was, then there was another gate right there. Farther up right on straight up this alley, the edge of the abbatoir.

The Court: Now, are you mixed up, this is supposed to be the alley here, sir.

The Witness: Oh, it is? Well, up here was the
396 end of the abbatoir, and there was one gate there of 30 feet south, there was another one making a double gate right there. On the end, the extreme end of the lane, there was another gate.

The Court: All right, sir.

By Mr. Denit:

Q. Now, with respect to the gate at the entrance to this passageway near the office and near the hog pens, was that kept locked or open? A. Locked at night, both ends.

Q. And how about the gate at the extreme end of the passageway? A. Locked.

Q. And how about these gates in between, that you have referred to? A. They was kept closed.

Q. Who kept the keys to those locks? A. The stockyard man.

Q. And can you describe the locks to us? A. Well, there was—yes, they was great big oldtime locks.

Mr. Denit: You may cross-examine.

Cross-Examination

By Mr. Wheatley, Jr.:

Q. That alleyway you pointed out, ran along the
397 whole side of the abbatoir property, didn't it? A.
You mean the stockyard lane?

Q. Yes, it ran right back to the end of the abbatoir prop-
erty, didn't it? A. That is correct.

Q. And they used that to take the fertilizer out of the
abbatoir and the coal and run the cattle into the slaughter-
house and everything, didn't they? A. That is right.

* * * * *

Thereupon, **George Robert Padgett**, called as a witness
on behalf of the defendant, being first duly sworn, was ex-
amined and testified as follows:

* * * * *

398 Q. What sort of work do you do? A. I am a but-
cher for the Southern Hotel Supply.

Q. How long have you been a butcher? A. I been a
butcher for 30 years.

Q. Were you ever employed at the Washington Abba-
toir? A. I was.

Q. During what period of time? A. Around 1928 to
1931.

Q. And you were employed as a butcher there? A. I
was.

Q. By whom? A. Well, then, after Keane sold out to
Gobel, I went out there with Gobel.

Q. Prior to that time, you worked for the Keane Com-
pany? A. That is right.

Q. Are you familiar with the stockyard adjacent to the
abbatoir? A. Yes, sir.

Q. Did you have to pass through the stockyard in order
to get to your place of employment? A. Yes, sir.

Q. Will you look at this plot plan which has been re-
ceived in evidence here and show us the entrance

399 to the stockyard? A. Well, this is Benning Road, then you come in here to the stockyard and the first pens was the hog pens. There was a low gate, around 3½, 4 feet high.

Q. With respect to the entrance to the yard, what was the location of that gate? A. Well, there was the office, the stockyard office was here, I would say it was down about here near the hog pen.

Q. Was the gate used to close the passageway? A. Yes, sir.

Q. Were there other gates in this passageway up to the abbatoir? A. It was.

Q. Would you indicate to us, generally, where they were? A. Well, this is the end of the building, there was a gate on this fence line and then there was a gate——

Q. Now, the fence line you are pointing to is located where? A. That run alongside the building to the railroad where they brought the cattle in from the railroad.

Q. That would be the building at the extreme north end of the property? A. That is right. They closed that gate off to run the cattle up into the roadway and then there was another gate at the end of the building, which
400 turned them off to run back to the hog pen, if they had hogs that come in, and then on the other side of the bridge was a gate. And then, there was an unloading platform where the farmers used to bring in the cattle on the other side of that little bridge, there was two gates there, as far as I can remember.

Q. How about at the extreme end of the passageway? A. Well, at the end of that, there was a gate all the way to the end and all the way up there was a gate where they used to run into the slaughterhouse, there was two gates there where they used to close off to run them into the killing pens.

Q. Now, with respect to the gate at the end of the passageway, do you know whether or not that was closed or left open? A. Well, that was closed.

Q. Was it locked? A. Overnight, it was locked.

Q. What time did the abbatoir cease operations during the day, do you know? A. Around 4:00 o'clock.

Q. And did the stockyard remain open after that? A. Not as I recall.

Q. In the morning, was that gate open or closed at the entrance? A. Well, before business started, it was always closed.

401 Q. Did you ever see it locked? A. Well, I can't recall seeing it locked.

Q. How about the gate at the extreme end of the passageway? A. Well, that was always kept locked.

Mr. Denit: You may cross-examine.

Cross-Examination

By Mr. Wheatley, Jr.:

Q. Mr. Padgett, where was your office, or where did you work in this set of buildings? A. I worked in the slaughterhouse.

Q. Would you tell us, please, where that was? A. This is the abbatoir here.

Q. Is that what you call the slaughterhouse, sir? A. That is what we call the slaughterhouse.

Q. Was this alley used to get into that slaughterhouse? A. That is where the gateway went into, where they used to drive the cattle in to killing.

Q. Do you remember where the fertilizer plant was? A. Well, the fertilizer plant was over to the left of the slaughterhouse.

Q. It was back here at the end, wasn't it? A. Well, I would say after you had gone into this gateway, you run into the slaughterhouse, there was an areaway that used to go to the fertilizer.

402 Q. Did you use this alleyway to get back into the fertilizer? A. Yes.

Q. So that the alleyway was used to get into this side, and also onto the stockyard side, wasn't it? A. Well, the roadway, the pens was on this side and the slaughterhouse was on this side, on the right-hand side.

Q. That is right, the pens were all on the east side and the abbatoir properties were all on the west side. A. That is right.

Q. And they used the alley to go either side? A. That is right.

Q. And the gates were open and closed simply to move the cattle, hogs or pigs into one pen or another, or in the slaughterhouse.

* * * * *

Q. Besides, I assume you used this alleyway, Mr. Padgett, going back and forth to your place? A. Yes, sir.

Q. Did any other people use it going back and forth to that place? A. The fellows working there, and people used to bring their cattle through there to the unloading platform.

* * * * *

403 Thereupon **Solomon Grossberg**, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

* * * * *

Q. Mr. Grossberg, will you give us your full name, please? A. Solomon Grossberg.

Q. You are a member of the Bar of this Court? A. I am.

Q. You have been for how many years? A. Approximately 20.

Q. You have engaged in 'active practice here in the District? A. I have.

Q. In 1945 and 1946, were you attorney for Fred Kogod? A. I was.

Q. Did you have occasion to go with him to the property in the vicinity of the old Washington Abbatoir?

404 A. Yes, I recall an occasion of that kind.

Q. On that occasion, did you and Mr. Kogod have some conversation with Mr. Cogito? A. We did.

Q. Will you tell us as nearly as you can recollect, what

that conversation was? A. Mr. Kogod and I had gone out to the property to look over the condition where Mr. Cogito's property, which adjoined his, was being used for the, I believe they were using the back part of it as a lumber yard or millwork yard, and he had opened a fence or a gate between the rear of his property and into Mr. Kogod's lot, and trucks were crossing Mr. Kogod's property to get into Mr. Cogito's property.

Q. Crossing from where to where? A. Well, they were crossing from various parts of Mr. Kogod's property into this gate that was on the common property lines between Mr. Kogod's and Mr. Cogito's property. In other words, this gate was, I would say, on the east side of Mr. Cogito's property. We met Mr. Cogito on there and Mr. Kogod complained about this gate being kept open, or the existence of the gate, and Mr. Cogito said that he had left definite instructions to keep it closed and he was sorry it was open. As a matter of fact, there was some locks on the gate at the time and he promised that he would keep it closed.

Q. Look at the photograph which has been marked
405 Defendant's Exhibit No. A-4, and tell us whether or not that shows the gate or gates that you refer to. A. That appears to be the gates, but when I saw it, they was not open, they was closed and there was a lock, a chain with a lock holding the two gates together.

Q. Was that locked in pursuance of the conversation between Mr. Kogod and Mr. Cogito that you have just related? A. Well, it happened to be on a Saturday, I think, that we were there and it was already locked when we got there; it was locked and he promised to keep it locked and he said that he had told the men to keep it locked.

Mr. Denit: You may cross-examine.

Cross-Examination

By Mr. Wheatley, Jr.:

Q. How many times did you talk to Mr. Cogito? A. On the property, I only spoke to him, as I recall, that one occasion.

Q. Just the once? A. That is my recollection, I might have spoken to him on the telephone, but I can't definitely recall.

Q. Well, it was only one occasion, that you recall, that you spoke to him at the property? A. That is right, to my best recollection, that is right.

406 Q. Can you tell us the date? A. I would say, well, I wouldn't know the date, probably four, five or six years ago, something like that.

Q. Did you make any memorandum of the date? A. I did not.

Q. Did you tell us the whole conversation you had with Mr. Cogito? A. I can't possibly repeat to you verbatim the whole conversation.

The Court: He didn't ask for that, he wants the substance of the whole conversation, sir.

The Witness: Well, the conversation was, well, the substance of the conversation was that he would keep the gate closed. As a matter of fact, around—if I can have a picture, if you have a plat of this property I could refer to——

By Mr. Wheatley, Jr.:

Q. Can you tell us, without referring to it? A. Yes, I can. On the north side of the building which is also the north side of Mr. Cogito's property as it bends around on a line parallel with Benning Road——

Q. Yes, sir. A. ——there used to be a window toward the, well, the east side, that is on the north side of that building but towards the eastern side of it, which Mr. Cogito changed into a door with a platform and that platform led out into Mr. Kogod's property. And some discus-

407 sion was had between us at that same time about the existence of that platform and door, and Mr. Cogito said, "Is it all right for me to keep this until you need to use this property?" And Mr. Kogod said, "Yes, until I need this property, it is all right for this platform to be out here." And he promised at that time not to keep those gates open at all.

Q. Now, those gates that you are speaking of, they are on the north end of the property then, are they? A. No, they are not to the north end of the property, they are on the east end of the property, south of the building.

Q. Wasn't your discussion with Mr. Cogito because the trucks came out of that gate and were going across the parking lot there by the Senator Theater, isn't that what your conversation was about? A. Our discussion was about trucks coming out onto that property at all.

Q. Yes, sir, and trucks coming out of the gate and wasn't the thing precipitated by the fact that Mr. Kogod said that the trucks were going across the parking lot? A. That is part of it.

Q. Isn't that right? A. The use of the property; as a matter of fact, we went out to see the whole situation.

Q. Didn't Mr. Cogito say he would see that the
408 trucks would stop going across the parking lot?

A. My recollection is he said he would see the trucks did not use the property, did not use those gates.

Q. And you were speaking, then, of the parking lot, weren't you? A. We were talking about the use of those gates.

Q. Did you mention the alley that ran alongside of his property? A. What alley are you speaking of?

Q. I am speaking of the alley that ran alongside of Mr. Cogito's property out to Benning Road on the east side of his property. Did you speak of that? A. An alley?

Q. Yes. A. I didn't know there was an alley.

Q. You never knew there was an alley? A. No.

Q. Did you ever know Mr. Cogito claimed an alley? A. Not until you filed a suit, or just before you filed a suit.

Q. Did you ever know that Mr. Cogito claimed he was entitled to a right-of-way alongside the east part of his buildings? A. No, sir, I never knew that.

Q. I beg your pardon, sir, would you look, please, 409 at this letter. I think you wrote a letter October 28, 1942, did you not, sir? A. Well, it is my handwriting, let me read it.

Q. Does that answer a letter you received from Mr. Cogito? A. Will you pardon me until I read this letter, please, sir?

Q. Go right ahead, sir. A. Yes, I wrote him this letter.

Q. Now, this letter mentions the roadway between the respective properties, doesn't it? A. That is an alleged roadway that he alleged—

Q. Then, he had alleged there was a roadway there? A. Yes, sir.

Q. But you had forgotten that? A. That is correct, that is ten years ago.

Q. But you had forgotten that? A. Yes, sir, ten years ago, I can forget.

Q. How long ago was this conversation you allege you had with Mr. Cogito, in which he was closing the gates? A. Oh, I say between four, five and six years ago.

* * * * *

410 Thereupon, **Joseph Cogito**, the plaintiff, called in rebuttal, having been previously sworn, was examined and testified further as follows:

* * * * *

Q. Did you testify in chief, Mr. Cogito, respecting all the conversations you had with Mr. Kogod? A. Not all of it, no, sir.

* * * * *

411 Q. Mr. Cogito, in Mr. Kogod's testimony of yesterday, he said that he had met you and Mr. Grossberg on Saturday, a Saturday between 11 and 12, and that you had told him that you had hired a man to put on the

gates, that you had bought the fencing from surplus and that the gates were a mistake, and that you walked around the property and that you ordered one of your men to lock the gate and keep it locked. A. That is not correct.

Mr. Denit: Just a moment.

* * * * *

By Mr. Wheatley, Jr.:

Q. And the man put a heavy chain around the gate and a lock on it and the gate was locked for a long while. Will you tell the Court whether that is the conversation you had with Mr. Kogod and Mr. Grossberg?

Mr. Denit: Your Honor please, my recollection is very clear that I asked Mr. Cogito that question on the witness stand and he denied he had any such conversation or any conversation like that.

The Court: If the defendant agrees he has already testified he never had the conversation—

* * * * *

412 Q. Mr. Cogito, did you have a conversation with Mr. Kogod relative to restrictions of trucks using the parking lot? A. I did.

Q. When, where and what was that conversation? A. The last conversation, the subject was on November 20, 1948. Mr. Kogod and Mr. Grossberg were present.

Q. And what was that conversation? A. That conversation was that Mr. Kogod and Mr. Grossberg, who objected to the trucks going through the parking lot from my gate to the driveway between the Giant and the Woolworth Store—I state then that I realize the situation, his position, if I was in his place I probably would feel like he did, but if he wanted to stop that traffic there, he should put a policeman or no trespassing sign or no trucks allowed, or a watchman.

Q. What conversation was had with respect to non-use of the alley? A. None whatsoever.

* * * * *

413 The Court: Gentlemen, the Court would like to have the plat made by the Coast & Geodetic Survey and also by the office of the Surveyor of the District of Columbia.

Mr. Wheatley, Jr.: Your Honor spoke of the one by the Surveyor of the District of Columbia, do you mean the 1906 survey, sir, or the one that was made for the plaintiff?

The Court: No, I mean the 1906 one.

Mr. Wheatley, Jr.: All right, sir. If Your Honor please if I may, before I close, ask the Court to take judicial notice of the Equity No. 63,228; we offer that in evidence.

The Court: What is it about?

Mr. Wheatley, Jr.: It is about the Gobel litigation with the District of Columbia concerning the reconstruction of the abbatoir facilities.

The Court: All right.

Now, gentlemen, I want some information and I can get it from counsel on both sides. Here is a plat that was published in 1895 by the Coast & Geodetic Survey, the witness stated he thought it was made about 1888 or 1889, as I remember.

Mr. Wheatley, Jr.: Yes, Your Honor, it is shown on the certificate sir.

The Court: Now, first, I would like to know, unless this land was owned at the time by the United States Government, what was the purpose of this survey; and it
414 could not have been owned by the United States Government, because the Union Stockyards are shown here and also various buildings. So, what is the significance of this particular plat, legally?

Mr. Wheatley, Jr.: The purpose of that, sir, is to show that at that time the topographical layout of the ground indicated that there was an alley then in existence on the place, not the question of the ownership but physically there was an alley there.

The Court: This plat, as I understand it, is not recorded among the land records of the District of Columbia?

Mr. Wheatley, Jr.: No, Your Honor, it is a government record of the United States, but not in the land records.

The Court: What was it made for, do you suppose?

Mr. Wheatley, Jr.: It was a topographical survey of the whole of the District of Columbia, that is a section of it. It showed the lands and the roads in the District of Columbia.

The Court: Now, here is a plat made by, it says Union Stockyards, and it was made in 1906 by the Surveyor of the District of Columbia. Now, what legal significance has it?

Mr. Wheatley, Jr.: That also shows the existence of the alleyway which is now in question, it existed at that time on the records of the Surveyor's office.

The Court: Well, there is an alley here which seems to correspond, in fact, there are two alleys here which seem to correspond in general direction with the so-called
415 subsidiary alley which is claimed by the plaintiff.

Mr. Wheatley, Jr.: Yes, Your Honor, and also the main alley, sir.

The Court: Oh, yes, the main alley is on.

Now, gentlemen, it is perfectly obvious that you can't get title to property by deed and you can't even get adverse possession by deed, unless the person who gives the deed owns the property, the deed is simply a nullity.

Now, the only deed that is in evidence from the defendant's standpoint is the deed to the defendant. Now, if these alleys were for general purposes, or for the use of anyone who had business in that property or who owned businesses in the property, then despite the fact that the deed given to defendant might include the alleys, that conveys no title to him to the alleys; but if the alleys were, as I said before, recognized passageways, there is no way that the defendant could receive a conveyance of them from a previous owner of the property.

Now, then, that would leave the defendant in the position where he would have to claim the alleys by adverse pos-

session. The only way you can get adverse possession—I have put everything down here I can think of—the only way you can show adverse possession, the possession must be open, it must be exclusive, it must be notorious, it must be adverse, it must be hostile, and it must be under
 416 claim of right. Now if there is anything else you can think about, tell me, but that is all I can think about in five minutes when I put this down. I think that about covers it.

Now, the undisputed evidence in this case is that this main alley was used by everybody who owned property there. There were two people especially, the stockyards crowd and the abbatoir crowd, they both used the alley, and as far as the gates are concerned, they were put there for convenience, not to indicate a closing in, a claim by adverse possession of the title to the property, but were put there for convenience.

Now, as to this additional alley—what do you call it?

Mr. Wheatley, Jr.: The auxiliary alley.

The Court: The auxiliary alley appears to run in the same direction as an alley shown on the survey made by the surveyors of the District of Columbia in 1906. There is no evidence in this case that the defendant ever acquired any title to that alley; if that was a recognized alleyway, it could only be acquired adversely to the public by adverse possession, and there is no evidence of adverse possession in the case.

Now, the views that the Court has expressed are tentative so that counsel may know just what is running through the Court's mind. And there is evidence of use in this case since 1907, without a break of more than a few
 417 years at a time, the break not constituting an abandonment but simply a non-use because the alley was not needed, up until 1937, I think, certainly 1933, that is also in evidence.

Now, I will hear you, gentlemen, if you have anything to say. If you think the Court has stated the law incorrectly,

I hope you will tell the Court about it and be honest about it, I am sure you will do the latter.

Mr. Wheatley, Jr.: For the second, sir, I am entirely satisfied with the Court's summation of the facts. The plaintiff's title, of course, has come down through this Union Stockyards Company which was the owner of all the property. Our deeds give us the right to the alleys, the appurtenances, the alleys as shown in the deeds, the alleys as shown on the plats, the alleys are part of the records of the government on exhibit here; they have been in constant use by owners of the property owned by the plaintiff since 1907.

The Court: What is your theory of the defendant's case, what is your theory of their legal title to these alleys?

Mr. Wheatley, Jr.: The only title he has is a deed title, subject to our claim for the easement.

The Court: Can you get title to property because somebody gives you a deed when they don't own anything to deed?

Mr. Wheatley, Jr.: He maintains he has a deed.

The Court: In back of my house in Denton, there
418 is a marsh and there is a fellow in town who wanted a marsh, so he went and got somebody who didn't own the marsh to give him a deed and he put it on record; he thought that gave him title to it, at least without ever taking any possession of the marsh that it at least started adverse possession; and the Court's claim was "nonense, silly." And unless these alleys have been acquired by adverse possession, they were laid out as alleys originally intended to be used as such, why no mere deed that somebody, who didn't have title to the alleys, gave to the defendant could give him title to the alleys.

Now, is that right or is that wrong, in your opinion?

Mr. Wheatley, Jr.: No, sir. We submit that these designations in the plats of alleys restricted his possession and his ownership, so the alleys were excluded from his ownership. He has made a claim of right by reason of the

obstruction placed across the alley, therefore, we brought this suit to enjoin that obstruction and ask that the alley be reopened for our use and the use of the public. That is our contention, we have the right to use the alley.

The Court: What about those gates that the defendant is relying on; te defendant takes the position because the gates were put up there and locked at night, that is evidence, he claimed, that he closed the alleys and claimed them at least by adverse possession which he says
419 was twenty-two years, by one of his witnesses it was twenty-two years. What do you have to say about that?

Mr. Wheatley, Jr.: Just what the witness said, that they were used to shuttle cattle into the various pens, not for obstruction of the alleyway. They were used, as Your Honor put it, for convenience. They blocked off, used a gate to make a passageway for cattle to move into a pen, but that wasn't an obstruction on the use of the alley passageway. As their own witness testified, that alley was uses for property, access and egress, and we respectfully say we do have that right of access through that passage-way.

The Court: What have you to say about the auxiliary alley?

Mr. Wheatley, Jr.: When we started this case, the auxiliary alley didn't seem to be in issue because there was no obstruction and, according to plaintiff's testimony, has always been used; so far as the record shows now, there has been no challenge of our right to use it.

The Court: Does, or does not, that appear to be an alley which was designated on the plat made by the Coast and Geodetic Survey?

Mr. Wheatley, Jr.: It certainly does, Your Honor, and it also appears in the plat made by the surveyor in 1906, according to Mr. Fernald's testimony.

The Court: All right, sir.

420 Mr. Denit: We disagree, You rHonor please, with the premise upon which Your Honor's views were

announced, namely, that we have any burden of establishing title. Plaintiff here is undertaking to establish the right and, under the law, the burden of proof is upon the plaintiff to establish it.

The Court: He doesn't have to establish title; all he has to establish is that the alleys were used for the convenience of the owners of the property, whoever they may have been, and the public who desired, for business reasons, at least, to use them. That is all he has got to do.

Mr. Denit: The difficulty with that, as we see it, is the plaintiff is claiming an easement in this property, not that it is a public alley.

The Court: I don't care what he is claiming. A court of equity has a right to pass upon the prayer for general relief, you know.

Mr. Denit: Yes, Your Honor, but the Court is also bound by the admissions made by the plaintiff, both in his pleadings and in the conduct of the trial. Now, the plaintiff has admitted title to this property is in the defendant. There isn't any question about that, he sets it out by metes and bounds in the complaint, he offered evidence of the conveyance from the defendant's predecessors in title to the defendant, conveying by metes and bounds every foot of the property involved in this case.

431 Now, he can't blow hot and cold, and the Court can't adopt a different theory.

The Court: The Court can let him amend his pleading, if he did a foolish thing like that; I don't know whether he did it or not.

Mr. Denit: Your Honor please, the Court has before it the deed from the plaintiff's predecessors in title to the Eastern Development Company, and then the Court has before it the evidence that Mr. Kogod and his wife took title from the Eastern Development Company, which was a corporation they formed for their convenience.

The Court: The Court doesn't think that, on the merits, you have got a shadow of a case. Of course, if the plain-

tiff has admitted something in his pleadings and doesn't care to amend them, why, he may be out of court. I don't know, I haven't read his pleadings; I read the pretrial, that is all I read.

Mr. Denit: In the pretrial order, the same admission is made, Your Honor please. Indeed, we go farther than that: the pretrial order expressly says that both parties claim from a common source of title, the defendant claiming the fee simple record title to all the property involved, the plaintiff claiming an easement upon one of three theories or all of them, namely, an easement by implied grant, an easement by prescription, and an easement by necessity.

Now, the plaintiff has introduced evidence, as we
422 conceive it, calculated to establish either one or all of those positions. There hasn't been a shadow of doubt in the case, from the very beginning until now, that the plaintiff concedes the record title of this property is in the defendant. I think that is palpably clear, if the Court please. Indeed, Your Honor asked the question during the course of the trial, "Does the plaintiff admit that the defendant likewise has a right to the use of this alley?" and the plaintiff said, "Yes."

The Court: Well, that is true.

Mr. Denit: Now, if that be true, then the title to the alleys cannot be in the plaintiff.

The Court: Well, the Court thinks that the evidence in the case shows that these alleys are public alleys, as far as that is concerned. The Court doesn't think that it is a matter of easement necessarily, at all; easement may be mixed up in it, but the Court thinks that the records in the case clearly show that these alleys never belonged to anybody, any individual. The Court is perfectly clear about that, sir.

Mr. Denit: Well, I differ with Your Honor, of course, and that is the end of that; because the only evidence in the case is the direct refutation of that, Your Honor,

namely, that title to this property was always in the Union Stockyards until conveyed away. And whatever right the plaintiff has is merely a right of use, if at all, to certain portions of the property to which the defendants have title.

The Court: Assuming the defendant has title to the property, and the Court doesn't think defendant has; assuming he has, the Court hasn't any doubt that the plaintiff has an easement. I don't mean it as an exclusive easement, the Court thinks the easement can be used by anyone who owns the property. The evidence on both sides is that the alley was used by not only your predecessors in title, but the plaintiff's predecessors in title.

Mr. Denit: Precisely, but how was it used? It was used with the permission of our predecessors in title, as evidenced by the fact that they controlled the time of day when people could come on this way, and they controlled the time of evening when they could not come on it.

The Court: The Court doesn't think so.

Mr. Denit: Your Honor, there isn't a shadow of evidence to the contrary. Mr. Keane, Mr. Padgett, and Mr. Gray, who were there during a long period of time, testified the gate to the front of this alleyway was locked and that the keys to the gate were kept by the employees of the stockyard.

The Court: That is merely a matter of convenience, sir. The alley was used, and certainly the plaintiff's predecessors in title, there is no question but what they had a right to use the alley, and the gates weren't locked except as a matter of convenience. The gates couldn't have been there for any other purpose, except to keep the hogs and cattle in.

Mr. Denit: If Your Honor please, they were kept there for the protection of the defendant's business, that is, the Union Stockyards' business. They were responsible for the safety of the animals that were lodged there, and they maintained this gate and maintained the yards, for what

purpose? To make a profit out of it. They were exercising control, the evidence is undisputed that the only people who did anything to keep this alleyway clean were the employees of the stockyards company. No employee of the abbatoir, no employee of any one of plaintiff's successive predecessors in title, had the slightest policing authority over this alley.

The Court: There is no evidence of that, one way or the other, sir.

Mr. Denit: There isn't any evidence they had authority, the Court can't presume——

The Court: The Court can't presume on either side.

Mr. Denit: No, sir, but I think Your Honor is presuming when you say there was a public alley in respect of the space to the north of the property and the space to the east.

The Court: I haven't any doubt about it in the world.

Mr. Denit: There has been no dedication of any such alley, sir.

The Court: These plats which are in evidence, the first one was made in 1888, show these alleys and show them clearly.

Mr. Denit: Yes, sir, but Your Honor please, they
425 show series of alleys almost as numerous as a labyrinth all over the property.

The Court: Besides the auxiliary alley, they show two more.

Mr. Denit: There is one on the side of the Baltimore and Ohio Railroad, there is one leading from the B&O back into the abbatoir, there is one on the extreme southerly end of the property, there are several leading down to the pens, the hog pens, cattle pens, and sheep pens, and they are designated as alleys certainly not for the purpose of describing technically something that constitutes an alley under a statute, and under our statute, the Court please, you can't have a public alley without a recorded indication of it. There is no title in the public to any part of this

property, and Mr. Cogito knew that at the time he took title. Mr. Cogito's deed doesn't purport to give him one shred of right to anything more than a right-of-way over the twenty-five foot paved roadway to the north of his property. Mr. Cogito saw that; Mr. Cogito, in the fact of that, mortgaged the property three times and never, in any one of the mortgages, attempted to include a right-of-way over the so-called auxiliary alley or the main alley.

And when Mr. Cogito and Mr. Kogod bought this property, what was its condition? It was such as to suggest

426 to no one that Mr. Cogito's claim of ownership extended beyond the west side of the fence along this paved alleyway, and it certainly had gone into disuse, the property had been substantially abandoned. Every inch of the property claimed by the stockyards was enclosed by fences erected by the stockyards and maintained by the stockyards. That is palpably clear, even by the ancient photograph that was admitted in evidence here, the place was completely fenced in order to protect the stockyard's property. You don't certainly, put fences around property simply for decoration, if the Court please. They were there to indicate the extent of ownership asserted, and here were these gates which the stockyards controlled and which nobody else, so far as this evidence is concerned, has a vestige of right to control.

We think that, on the contrary, in this case the burden of proof was upon the plaintiff to establish a right-of-way, that is the basis of the complaint. Now, there is no evidence in the case of any adverse use by the plaintiff or his predecessors in title. Everything that was done, was done with the permission of the stockyards, everything.

The Court: There is no evidence of that, sir.

Mr. Denit: Of course there is, Your Honor.

The Court: Of course there isn't any such thing, not a word of evidence of that. I don't want to be impatient, sir, but there is no evidence of what you say. The evidence is that both the stockyards and the abbatoir had ac-

427 cess to the property, insofar as they needed access to the property, at all times, and that is all the evidence there is in the case.

Mr. Denit: Mr. Keane testified his father undertook to bring some hay in there——

The Court: I know Mr. Keane did, but he wasn't the only witness in the case. The plaintiff had some seven or eight witnesses, all of whom testified there was access to that property for anybody who had business in there; there is no question about that, and they were all witnesses who, as far as I know, had no interest in the case one way or the other.

Mr. Denit: We don't claim they had any interest in the case or didn't tell the truth as far as they knew it, but not one of those witnesses was interrogated by counsel as to whether or not there was a gate in the property.

The Court: You had the chance to do it, if you wanted to.

Mr. Denit: We had a chance to do it, but were were not going to take a chance on getting answers from witnesses we had never seen, when we had evidence from witnesses we knew. Furthermore, the evidence produced by the plaintiff in the form of a photograph taken in October, 1942, showed what these men said—Keane, Padgett, and Gray—was true, because the gate was still there and it showed in the photograph, a gate that would completely block passageway beyond the north wall of the so-called sausage factory. Those gates were there all the time
428 according to Mr. Keane, who has known the property since 1906 and 1907.

We submit, if the Court please, instead of showing an adverse use, all that you can say about the evidence on behalf of the plaintiff is that it shows a use, a use with the knowledge and consent of the owner of the fee, and those circumstances, under the decisions, do not constitute proof of adverse use.

The Court: Of course they don't, if that is the testimony; that isn't the testimony, as the Court understands it.

The Court will hear the plaintiff further, maybe you can further clarify your position.

Mr. Wheatley, Jr.: Your Honor please, I feel I would be arguing against my own position to take any position contrary to the one you have already stated.

The Court: Yes, I know, but the defendant says your pleadings concede—and I haven't read them, I read the pre-trial order which was the only thing necessary for me to read at that time—he said that you have conceded that he has the legal title to the land covered by these alleys, and the Court thinks that there is evidence that these alleys were intended to be kept open, not intended to be conveyed in fee simple to anybody. Now, have you made any concession in your pleading?

Mr. Wheatley, Jr.: I respectfully submit that I
429 have not. I said this, in my pleadings, that he has a deed which conveys to him all of the property which is included in these alleys.

The Court: That is a very different position.

Mr. Wheatley, Jr.: But we claim our easement and right-of-way in these alleys are paramount to that right-of-way granted to his right by that deed.

The Court: Isn't there evidence the alleys were originally intended, and always used to be, used as alleys to be used by the property?

Mr. Wheatley, Jr.: Yes, Your Honor, that is exactly our point. All these deeds we put in show the alley was there; the 1906 deed, which gave us the right to use the alley and the alley is shown on the plats in evidence; it has been used consistently, by the testimony of witnesses, since 1907 when Kelle was there, until now; it has been used, according to the plats we have, Your Honor, since 1884, the Coast and Geodetic Survey plat. We charge in our pleadings they have title to the land subject to the claim of the easement which existed in the alleys as they were then; that doesn't concede he has title to the alleys, we say we have the right to use those.

If Your Honor says we have the right, but it is not an easement, it is a public alley, that gives us exactly what we want, anyhow.

The Court: The defendant says, under the statute of the District of Columbia, a public alley can only be
430 shown by dedication and recordation. I just don't know about it because I have had no occasion to look into that phase of the situation.

Mr. Wheatley, Jr.: I respectfully submit to Your Honor, without reference to the statute which my friend suggests, that this alley has been shown in the land records since 1894 in the original lease to the Washington Abattoir Company; it was shown on the plat attached to the deed; it has been shown in the records of the Surveyor's Office ever since 1906; it is actually in existence as an alley; it was apparently intended to be dedicated to the public by the plat which is filed with the Surveyor which shows these alleys. Now, what interest the public may have in the alley, we are not concerned with.

The Court: What you mean is that while there may not be any legal dedication of the alleys to the public, there was a dedication by long usage, dedication in equity, that is what you mean.

Mr. Wheatley, Jr.: A dedication in fact; yes, sir.

The Court: Well, in equity.

Mr. Wheatley, Jr.: Yes, Your Honor, and that is our position.

The Court: All right, sir.

Mr. Denit: I don't want to labor this question, if the Court please.

431 The Court: That is all right, sir.

Mr. Denit: I direct attention to paragraph 15 of the complaint:

"The defendants own the property adjoining the property of the plaintiff, and said property was acquired by them as hereinafter set forth."

Paragraph 16:

“The Union Stockyard Company conveyed to the Eastern Development Company by deed, dated June 27, 1941, the property now owned by the defendants, described in the next succeeding paragraph.”

And in paragraph 17:

“It is alleged that the Eastern Development Company conveyed to Fred S. Kogod and Celia Kogod, his wife, by deed dated”—it is described here—the property now owned by the defendant, in which said deed the property is described as follows:”

If that doesn't amount to a statement that the defendants own the property described in the deed—

The Court: The Court doesn't think that that means that the defendant owns the alleys.

Mr. Denit: Then there was offered in evidence the deed which is referred to.

Mr. Wheatley, Jr.: The deed has never been offered.

Mr. Denit: Maybe I am wrong, but you conceded
432 that we had title to this property as described in paragraph 17 of the complaint.

The Court: Gentlemen, the Court hasn't a bit of doubt about this case, not a bit in the world. The Court will grant the injunction both as to the main alley and the subsidiary alley.

(Whereupon, the foregoing proceedings were concluded.)

III.

EXHIBITS.

Plaintiff's Exhibit No. 1

THIS IS TO CERTIFY that the pages attached hereto constitute a full, true, and complete copy of a Deed, by and between, Alvin N. Bastable, et ux, Grantors, and Union Stock Yard Company, Grantee, Dated on the 14th day of October, 1887, and recorded on the 15th day of November, 1887, at 11:15 A. M. in Liber No. 1280, Folio 452 as the same appears of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of this office to be affixed, this the 12th day of February A. D. 1951.

MARSHALL L. SHEPARD,
Recorder of Deeds, D. C.

[SEAL]

By ELEANORE DAGUE WILLIAMS,
Deputy Recorder of Deeds.

ALVIN N. BASTABLE ET UX

TO

UNION STOCK YARD COMPANY

DEED

Recorded Nov. 15th 1887 11:15 A. M. (11)

THIS INDENTURE made this Fourteenth day of October, in the year, one thousand eight hundred and eighty seven, between Alvin N. Bastable and Geraldine S. Bastable, his wife, of the City of Baltimore, State of Maryland, of the first part, and Union Stock Yard Company a Corporation duly created under the laws of the State of New Jersey,

of the second part: WITNESSETH, that said parties of the first part for and in consideration, of the sum of one dollar, and other valuable considerations to them in hand paid by said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof, is hereby acknowledged, have given, granted, bargained, and sold, aliened, enfeoffed, released, conveyed, and confirmed, and by these presents, do give, grant, bargain, and sell, alien, enfeoff, release, convey and confirm unto said party of the second part its successors and assigns forever, All those certain pieces or parcels of land situate and lying in the District of Columbia, known and distinguished as and being all of Lot numbered five (5), in the division of Joshua Beall's estate among his heirs at law, of the lots laid off at the end of Anacostia Bridge. Lying on the Eastern side of the Eastern Branch of the Potomac River, containing three (3) Acres of land more or less, and situated on the South side of the public road leading from Upper Bridge to Marlborough, at the junction, or where said road crosses the Bladensburgh Road, and known as the corner Lot, except such parts as are used by the Baltimore and Potomac, and Washington City and Point Lookout Railroad, Being the same property conveyed to said Alvin N. Bastable in different parcels by five deeds recorded respectively in Liber No. 1252 folio 275, et seq., Liber 1252 folio 278, et seq., Liber 1252 folio 283 et seq., Liber 1266 folio 205 et seq., and Liber 1268 folio 497 et seq., of the Land Records of said District, reference to which is here made. Also part of a tract of land called "Fortune Enlarged," and part of the tract conveyed to Albert C. Straus by deed from Selly B. Scaggs, et ux recorded in Liber R. M. H. No. 17 folio 209 et seq., of the Land Records of said District, being all of said tract bounded on the East by the Anacostia Road, on the West by the Washington City and Point Lookout Railroad, now known as the Shepherd Branch of the Baltimore and Ohio Railroad, on

the North by the Alder, Dye, Carrick, and Fravers tracts, and on the South by the land belonging to the widow and heirs of Selly B. Scaggs containing twelve acres of land less so much as is occupied by the Baltimore and Potomac Railroad and said Baltimore and Ohio Branch railroad. Being the same property conveyed to said Alvin N. Bastable by deed duly recorded in Liber No. 1252 folio 281, et seq., of the Land Records of said District, reference to which is here made, with the buildings, rights, privileges and appurtenances, to the same belonging, or in anywise appertaining, and all the estate, right, title, interest, claim, and demand whatsoever both at law, and in equity of said parties of the first part, or either of them of, in, and to the same. To have and to hold said parcels of land and premises with the appurtenances unto said party of the second part, its successors and assigns for its and their use and benefit forever. And the said parties of the first part, for themselves and for their heirs, executors, and administrators, do hereby covenant, promise, and agree, to and with the said party of the second part, its successors, and assigns, that they the said parties of the first part, and their heirs, shall and will warrant, and forever defend, the said pieces or parcels of land and premises and appurtenances, unto the said party of the second part, its successors and assigns, from and against the claims of all persons claiming, or to claim the same, or any part thereof, by, from, under, through or in trust for said parties of the first part, or either of them, or their heirs. And further, that they, the said parties of the first part, and their heirs, shall and will at any and at all times hereafter, at the request and cost of the said party of the second part, its successors and assigns, make and execute any and every other deed of assurance in law, for the more sure and effectual conveyance of the said parcels of land and premises with the appurtenances to the said party of the second part, its successors and assigns, that

the said party of the *of the* second part its successors or assigns, or its or their counsel, learned in the law, shall or may devise, advise, or require. In Testimony Whereof, the said parties of the first part, have hereunto set their hands and affixed their seals on the day and year first hereinbefore mentioned.

Signed, sealed and delivered in the presence of

PH. H. HOFFMAN

HENRY B. HEMMETER

ALVIN N. BASTABLE [SEAL]

GERALDINE S. BASTABLE [SEAL]

STATE OF MARYLAND,
CITY OF BALTIMORE, to wit:

I PHILIP H. HOFFMAN, a Commissioner of Deeds, for District of Columbia, in and for the State and City aforesaid, do hereby certify, that Alvin N. Bastable and Geraldine S. Bastable, his wife, parties to a certain Deed, bearing date on the 14th day of October, A. D. 1887, and hereto annexed, personally appeared before me, in said State and City, the said Alvin N. Bastable and Geraldine S. Bastable, being personally well known to me as the persons who executed the said Deed, and acknowledged the same to be their act and deed; And the said Geraldine S. Bastable being by me examined privily and apart from her husband, and having the Deed aforesaid fully explained to her by me, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it. Given under my hand and *and* Official seal, this 15th, day of November, A. D. 1887.

PH. H. HOFFMAN

[COMMISSIONER'S SEAL]

*Commissioner of Deeds, for
District of Columbia, in Maryland
of Baltimore City*

Plaintiff's Exhibit No. 2
PRE-TRIAL EXHIBIT, R B H, Judge

KNOW ALL MEN BY THESE PRESENTS

THAT whereas Adolf Gobel, Inc. filed a voluntary petition for reorganization under Section 128 of Chapter X of the Act of Congress relating to bankruptcy in the District Court of the United States for the Southern District of New York on September 29, 1941, which petition was duly approved by the Honorable Alfred C. Coxe, United States District Judge, by order entered on the 30th day of September, 1941; and

WHEREAS, Charles Seligson was duly appointed trustee and Andrew E. Nelson was duly appointed additional trustee for Adolf Gobel, Inc., the debtor, on the 30th day of September, 1941, and thereafter duly qualified; and

WHEREAS the said trustee filed his petition in said court, praying among other things for authority to sell certain real estate therein mentioned and hereinafter described; and

WHEREAS such proceedings were had on said petition in accordance with the provisions of the Act of Congress relating to bankruptcy in such case made and provided after due notice, that on the 13th day of October, 1942 said trustees were duly authorized by said court to sell the real estate mentioned in said petition and hereinafter described, at private sale to J. Cogito of Washington, D. C. for the sum of \$30,500 free and clear of all encumbrances but subject to any and all covenants, conditions and restrictions of record affecting the said property or its use and subject to any and all violations or restrictions affecting the property or its use found or imposed by the Government of the District of Columbia, and to execute and deliver a proper deed to the purchaser of the real estate so sold, or his nominee; and

WHEREAS an order was entered by the said District Court of the United States for the Southern District of

New York on November 27, 1942, which, among other things, removed the said Andrew E. Nelson as additional trustee of Adolf Gobel, Inc. and continued the said Charles Seligson as sole trustee of Adolf Gobel, Inc., and vested the said Charles Seligson, as said trustee, with all the authority and power theretofore vested in the said Charles Seligson and the said Andrew E. Nelson by order of said court dated October 13, 1942 to sell the real property of the debtor located in the District of Columbia, hereinafter described.

All of which will more fully appear by the records of said court, to which reference is here made.

NOW THEREFORE, Charles Seligson, as and only as trustee of Adolf Gobel, Inc., debtor, and not individually, by virtue of the title and powers in him vested by the provisions of the Act of Congress relating to bankruptcy and in exercise of the authority to him granted by said court, and for and in consideration of the sum of \$30,500 to him in hand paid by said J. Cogito, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey unto the said J. Cogito, his heirs, executors, administrators and assigns forever, certain real estate situated in the District of Columbia, to wit part of a tract of land called "Fortune Enlarged" and part of Lot numbered Five (5) in the division of the Estate of Joshua Beall among his heirs, being part of the tract of land known as "Fife" and "Fife Enlarged" and being part of the land conveyed to the Union Stock Yard Company by deed recorded in Liber 1280 at folio 452 among the Land Records of the District of Columbia, described by metes and bounds as follows:

Beginning for the same at a point in the Easterly line of the right of way of the Alexandria Branch of the Baltimore and Ohio Railroad, distant South 44° 01' West, 81.64 feet from the intersection of said Easterly line of said right of way with the Southerly line of Benning Road (110 feet wide), and running thence

South 37° 42' East 36.34 feet (actual measurement 36.44 feet); thence North 43° 54' East 15.51 feet; thence South 38° 36' East 31.11 feet (actual measurement 31.19 feet); thence South 76° 43' East 13.57 feet (actual measurement 13.60 feet) to a stone; thence South 37° 42' East 65 feet (actual measurement 65.18 feet) to a stone; thence South 39° 21' West 359.90 feet (actual measurement 360.38 feet) to a stone; thence North 50° 39' West 152 Feet (actual measurement 152.50 feet) to the said right of way of the Alexandria Branch of the Baltimore and Ohio Railroad; thence along said Easterly line of said right of way, North 39° 21' East 50 feet to a stone; thence continuing along said line of said right of way North 41° 03' East 317.82 feet (actual measurement 318.35 feet) to the place of beginning,

as shown upon plats of survey respectively, recorded in the Office of the Surveyor for the District of Columbia in Survey Book 109 at page 485 and Survey Book 142 at page 326, now known for purposes of assessment and taxation as Parcel 168/50; subject to the sewer privilege granted the District of Columbia by Michael A. Keane and Andrew D. Loffler, Trustees, by deed dated March 1, 1916 and recorded in Liber 3864 at folio 293 among the Land Records of the District of Columbia; with right of way over the following described parcel of land, beginning for the same at the intersection of the South line of Benning Road with the Easterly line of the right of way of the Baltimore and Ohio Railroad, and running thence Southwesterly along said line of said right of way to the Northerly line of the parcel of land above described; thence Southeasterly along the Northerly line of the land above described, 25 feet; thence Northeasterly in a straight line to the Southerly line of the Benning Road and distant 25 feet from said Easterly line of the land of said Railroad Company, and thence Westerly to the point of beginning.

And all of the right, title and interest in and to the same of said Adolf Gobel, Inc., together with any and all right, title and interest or estate which Adolf Gobel, Inc., debtor,

or Charles Seligson, as trustee of Adolf Gobel, Inc., debtor, may have or could claim or assert in and to any of the land adjoining the above described property on the North, East or South, free and clear of all liens and encumbrances, but subject to any and all covenants, conditions and restrictions of record affecting said property or its use and subject to any and all violations or restrictions affecting the property or its use, found or imposed by the Government of the District of Columbia.

To have and to hold said premises with all of the privileges and appurtenances thereto belonging, and the rents, issues and profits thereof to the said J. Cogito, his heirs, executors, administrators and assigns forever, as fully and completely as the said Charles Seligson as trustee of Adolf Gobel, Inc., debtor, under Chapter X of the Act of Congress relating to bankruptcy, by virtue of said authority from said court and of the statutes made and provided for such cases, may sell and convey the same.

IN WITNESS WHEREOF, the said Charles Seligson, as and only as trustee of Adolf Gobel, Inc., debtor under Chapter X of the Act of Congress relating to bankruptcy, and not individually, has herein set his hand and seal this 4th day of February, A. D., 1943.

CHARLES SELIGSON [SEAL]

As and only as trustee of Adolf Gobel, Inc., debtor under Chapter X of the Act of Congress relating to bankruptcy, and not individually.

STATE OF NEW YORK,
COUNTY OF NEW YORK, To Wit

I, SIDNEY S. BERKELY, a notary public in and for said County and State of New York, do hereby certify that Charles Seligson, trustee for Adolf Gobel, Inc. under Chapter X of the Act of Congress relating to bankruptcy, party to a certain deed bearing date on the 4th day of February, A. D. 1943, and hereunto annexed, personally appeared

before me in said County and State of New York, the said Charles Seligson, trustee for Adolf Gobel, Inc. under Chapter X of the Act of Congress relating to bankruptcy, as aforesaid, being personally known to me as the person who executed the said Deed and acknowledged the same to be his act and deed.

GIVEN under my hand and seal this 4th day of February, A. D. 1943.

SIDNEY S. BERKELY [SEAL]

Notary Public, New York County

N. Y. Co. Clk's No. 100, Reg. No. 4-B-534

Kings Co. Clk's No. 274, Reg. No. 4359

Commission expires March 30, 1944

* * * * *

No. 79526

IN THE MATTER

of

ADOLF GOBEL, INC., *Debtor*

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, SS.

I, GEORGE J. H. FALLMER, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that: Charles Seligson is the trustee under Chapter X of the Bankruptcy Act of the above-named debtor, duly qualified and acting as such. The above proceeding is still pending in this Court and Charles Seligson has not been discharged as such trustee. That Charles Seligson was appointed trustee by order of Hon. Alfred C. Coxe, United States District Judge, dated September 30, 1941.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York this 22nd day of January in the year of our Lord one thousand nine hundred and forty-three and of

the independence of the United States the one hundred and sixty-seventh.

[SEAL]

GEORGE J. H. FALLMER,
Clerk.

[BACK COVER]

DEED

Charles Seligson, Trustee of
Adolf Gobel, Inc.
to
J. Cogito

Received for Record on the 11 day of February, A. D. 1943, at 2:40 o'clock P. M., and recorded in Liber No. 7833 at folio 158 one of the Land Records of the District of Columbia, and examined by

WM. J. TROUGKINS,
Recorder.

Plaintiff's Exhibit No. 4

PRE-TRIAL EXHIBIT, R B H, *Judge*

THIS IS TO CERTIFY that the pages attached hereto constitute a full, true, and complete copy of a Lease, by and between, Union Stock Yard Company, Grantors, and Washington Abattoir Co., Grantees, Dated on the 26th day of February, 1890, and Recorded on the 18th day of March, 1890, at 11:45 A. M. in Liber No. 1470, Folio 249 as the same appears of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of this office to be affixed, this the 29th day of January A. D. 1951.

[SEAL]

MARSHALL L. SHEPARD,
Recorder of Deeds, D. C.

By ELEANORE DAGUE WILLIAMS,
Deputy Recorder of Deeds.

LEASE

Recorded March 18th 1890 11:45 A. M. 23

UNION STOCK YARD Co.

to

WASHINGTON ABATTOIR Co.

THIS INDENTURE MADE this twenty sixth day of February in the year of our Lord one thousand Eight hundred and ninety between the Union Stock Yard Company a corporation duly organized under the laws of the State of New Jersey party of the first part and the Washington Abattoir Company of West Virginia a corporation duly organized under the laws of the State of West Virginia party of the second part WITNESSETH THAT the Union Stock Yard Company for and in consideration of the rent, covenants and agreements hereinafter mentioned and reserves on the part and behalf of the said party of the second part to be done and performed hath granted devised and leased and by these presents doth grant devise and lease unto the said the Washington Abattoir Company of West Virginia its successors and assigns all that piece or parcel of ground situate at Bennings in the District of Columbia being part of the grounds now occupied by the said Union Stock Yard Company as a stock yard and more particularly described as follows towit. Beginning for the same at the corner formed by the face of the wall on the south side of the branch and the fence on the West side of the Main Alley in said grounds thence running with the line of the fence south $43\frac{1}{4}^{\circ}$ West two hundred and thirty feet to a cedar post, thence North with the line of posts $46\frac{3}{4}$ degrees West 120 feet to a post thence South $43\frac{1}{4}$ deg. West with the line of fence 108 feet to a post on the line of an Alley thence North $46\frac{3}{4}$ deg. West 32 feet to the line between the lands of the Baltimore and Ohio Rail Road Company and those of the Union Stock Yard Company thence North Eastwardly

along said line of division 374 feet to the Northeastward face of the wall near the branch aforesaid and thence along said wall to the place of beginning a plat of which said parcel of land is hereto attached marked "A" and said Union Stock Yard Company doth also grant devise and lease unto said party of the second part its successors and assigns the right of way and passage at any and at all times for the Officers servants cattle horses and vehicles of the said party of the second part and for its patrons and their horses vehicles and cattle to and from the land so above described and leased over and by way of the strip of land marked "Drive Way" in the aforesaid plat and described as follows: Beginning at the intersection of the south line of Bennings road and the East line of the land of the Baltimore & Ohio Railroad Company and running thence South Westward along the said East line of said rail road lands to the land above granted and devised thence South East along the North East line of said land so granted and devised twenty five feet, thence to said Bennings road on a straight line distant twenty five feet from said Rail road lands and thence Westward to the place of beginning. To Have and to Hold the said piece or parcel of ground so above devised granted and leased and the said right of way as appurtenant thereto unto the said party of the second part its successors and assigns from the twenty sixth day of February A D 1890 for and during the full term of forty years from thence next ensuing and fully to be complete and ended yielding and paying therefor yearly and every year during the said term unto the said Union Stock Yard Company its successors and assigns the yearly rent of One dollar lawful money of the United States and taxes on their improvements on the first day of March in each and every year the first payment thereof to begin and be made upon the first day of March next ensuing the date of these presents. And the said party of the second part for its self its successors and assigns doth covenant grant and agree to

and with the said party of the first part its successors and assigns, that it the said party of the second part its successors and assigns shall well and truly pay or cause to be paid unto the said party of the first part its successors or assigns the aforesaid yearly rent of One dollar at the days and times as hereinbefore is limited and appointed for the payment thereof according to the intent and meaning of these presents and that it will also from time to time and as the said party of the first part shall render to it the bills therefor repay to said party of the first part all taxes which may be assessed and levied by the Authorities of the District of Columbia upon or on account of the Buildings and other improvements which shall have been erected on said premises by the said party of the second part and which taxes shall have been paid by the said party of the first part. And further that it the said party of the Second part its successors or assigns shall and will on or before the first day of January A D 1891 at its or their own proper cost and charges in All things make erect build and finish or cause or procure to be made, erected build and finished upon the said piece or parcel of ground hereinbefore granted and devised a good and substantial building or buildings planned and suited for the Abattoir or place for the Slaughtering of meat Cattle, sheep and Hogs and for the proper care of the carcasses thereof. And further that it the said party of the second part its successors and assigns shall and will from time to time and at all times during the said tenure of years above granted and devised well and sufficiently repair support maintain and keep the said building or buildings so to be erected and finished in by and with all needful reparations whatsoever and will maintain the same as an Abattoir and will carry on and conduct therein the business of Slaughtering meat Cattle, sheep and Hogs and Caring for the Carcasses thereof Provided also and it is further covenanted and agreed by and between the said parties to these presents that if the said

party of the second part its successors or assigns do not before the first day of January A D 1891 aforesaid make erect build and finish the said building in all things as the said party of the second part hath hereinbefore covenanted and agreed to do or if at any time during the term hereinbefore covenanted and agreed to do or if at any time during the terms hereinbefore granted the said party of the second part its successors or assigns shall for the space of Eighteen Months at any one time cease to maintain the said premises as an Abattoir and conduct thereat the business of Slaughtering cattle sheep and hogs and caring for the carcasses thereof as aforesaid that then and on the happening of either of said contingencies and from thenceforth this present lease and device and every thing therein contained shall cease be void and of no effect and the Estate hereby granted to said party of the second part its successors and assigns shall cease and determine to all intents purposes and constructions whatsoever. Anything herein contained to the contrary thereof notwithstanding. And the said Union Stock Yard Company doth for its self its successors and assigns covenant and agree to and with the said party of the second part that it the said party of the second part its successors and assigns paying the rent and performing all and singular the covenants and agreements before in and by these presents reserved specified and contained on its or their part and behalf to be done, paid performed and kept shall and lawfully may peaceably and quietly have, hold occupy possess and enjoy the said piece or parcel of land hereinbefore granted and devised and the aforesaid right of way together with the said building or buildings to be erected and built as aforesaid with the appurtenances for and during the said term hereinbefore granted without the lawful let, suit, trouble, Molestation, expulsion or interruption of or by it the said party of the first part its successors or assigns or of or by any other person or persons whomsoever lawfully claiming or to claim by from under or against it

them or any of them or by or with them or any of their privity consent or procurement. And said Union Stock Yard Company doth further covenant and agree with said party of the second part that it will promptly pay and satisfy all taxes and assessments which may from time to time be levied on said premises or any part thereof. It is further expressly understood and agreed that the within lease shall not in any way interfere with the rights of said Stock Yard Company so far as the usual stock yard charges are concerned but that on the contrary all stock arriving at said yard to be Slaughtered at said Abattoir shall be subject to said charges. In Witness Whereof each of the said parties hereto has caused its Common Seal to be hereto affixed by the hand of its President the day and year first hereinbefore written.

[CORPORATE SEAL]

A. N. BASTABLE, *Prest,*
Union Stock Yard Co.

Attest C. F. KERCHNER, *Secretary.*

[CORPORATE SEAL]

WM. E. CLARK, *President,*
Washington Abattoir Co. of West Va.

Attest J J BRAMSON, *Secretary.*

STATE OF MARYLAND,
CITY OF BALTIMORE, SS.

I, MURRAY HANSON a Notary Public of the State of Maryland in and for the City of Baltimore do hereby certify that A. N. Bastable, President and C. F. Kerchner, Secretary of the Union Stock Yard Company parties to a certain Indenture bearing date on the 26th day of February A D 1890 and hereto annexed personally appeared before me in the City of Baltimore aforesaid the said A. N. Bastable and C. F. Kerchner being personally well known to me as the persons who executed the said Indenture and acknowledged the same to be their act and deed as President and Secretary of the said Union Stock Yard Company and

as the act and deed of said Union Stock Yard Company and that the seal affixed to said Indenture is the Corporate Seal of said Union Stock Yard Company and was so affixed by order of the Board of Directors of said Company. In Witness Whereof I have hereto set my hand and affixed my Notarial Seal at Baltimore this 13th day of March A D 1890.

[NOTARIAL SEAL]

MURRAY HANSON,
Notary Public.

STATE OF MARYLAND,
BALTIMORE CITY, SS.

I Hereby Certify that MURRAY HANSON ESQUIRE before whom the annexed acknowledgments were made and who has hereto subscribed his name was at the time of so doing a Notary Public of the State of Maryland in and for the City of Baltimore duly commissioned and sworn and that to all acts done by him in that capacity full faith and credit are due and ought to be given and that I am well acquainted with his handwriting and believe that his signature thereto is genuine. In Testimony Whereof I hereto set my hand and affix the seal of the Superior Court of Baltimore City this 13 day of March A D 1890.

[COURT SEAL]

JAS BOND,
*Clerk of the Superior Court
of Baltimore City.*

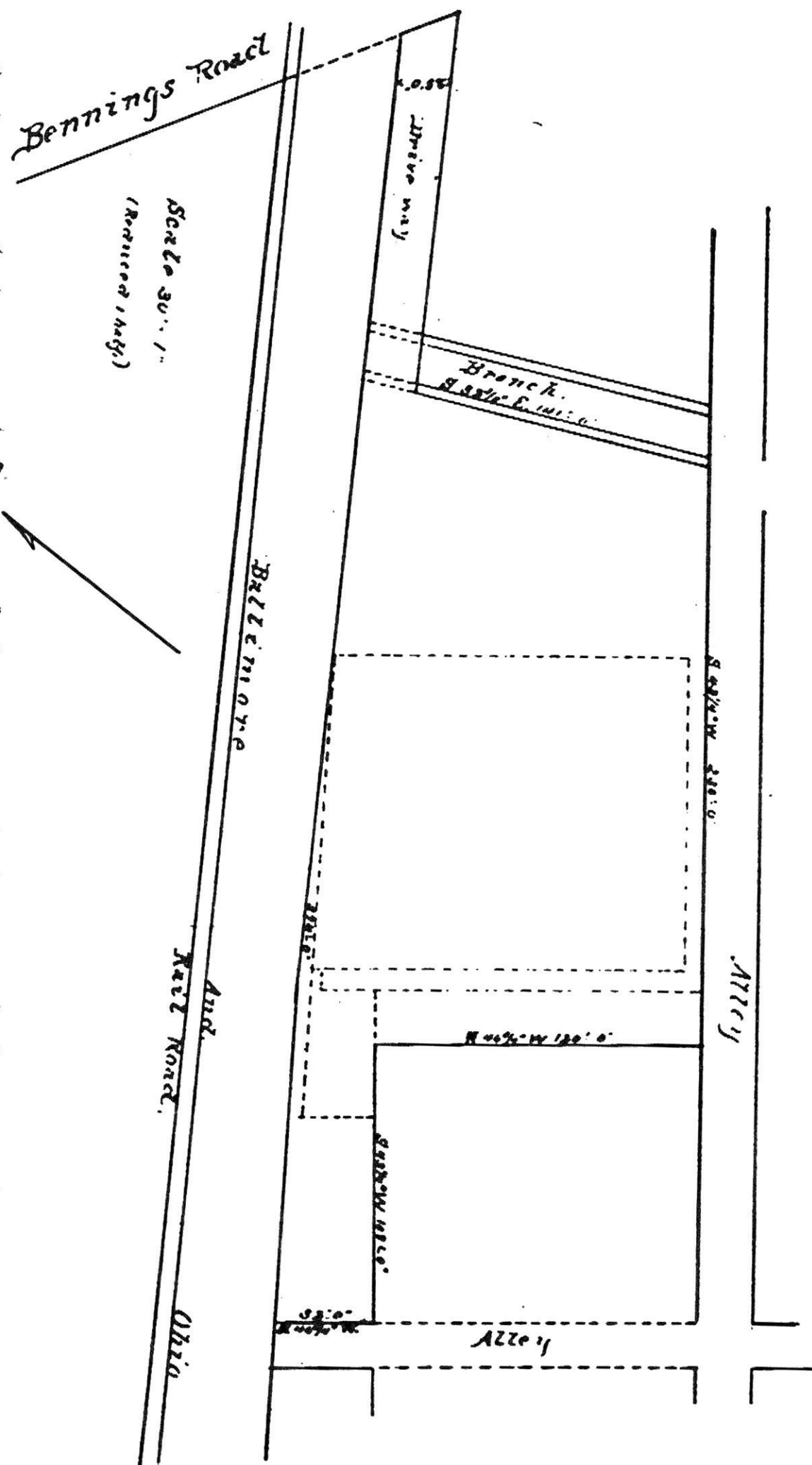
DISTRICT OF COLUMBIA, SS.

I OLIVER L. THOMPSON a Notary Public for the District of Columbia, do hereby certify that WILLIAM E. CLARK, President of the Washington Abattoir Company of West Virginia a party to a certain Indenture hereto annexed personally appeared before me in said District the said William E. Clark being personally well known to me to be the person who executed the said Indenture and acknowledged the same to be the act and deed of the said the Washington Abattoir Company of West Virginia and that the

seal thereto affixed is the Corporate Seal of said Company and was so affixed by Order of the Board of Directors of said Company. In Witness Whereof I have hereto set my hand and Notarial Seal this 14th day of March.

[NOTARIAL SEAL]

OLIVER L. THOMPSON,
Notary Public.



Plaintiff's Exhibit No. 5
PRE-TRIAL EXHIBIT, R B H, Judge

THIS IS TO CERTIFY that the pages attached hereto constitute a full, true, and complete copy of a Deed, by and between, Union Stock Yard Company of New Jersey, Grantors, and Washington Abattoir Company of West Virginia, Grantees, dated on the 20th day of September, 1894, and recorded on the 22nd day of September, 1894, at 12:06 P. M. in Liber No. 1946, Folio 283 as the same appears of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of this office to be affixed, this the 29th day of January A. D. 1951.

MARSHALL L. SHEPARD,
Recorder of Deeds, D. C.
 By ELEANORE DAGUE WILLIAMS,
Deputy Recorder of Deeds.

[SEAL]

DEED

Recorded Sept 22nd 1894 12:06 P. M. (25)

THE UNION STOCK YARD CO. OF NEW JERSEY

to the

WASHINGTON ABATTOIR CO. OF WEST VIRGINIA

THIS INDENTURE made this 20th day of September in the year 1894, by and between the "Union Stock Yard Company of New Jersey" a corporation duly organized under the laws of the State of New Jersey, of the first part, and "The Washington Abattoir Company of West Virginia," a corporation duly organized under the laws of the State of West Virginia, of the second part, witnesseth: Whereas, at a regular meeting on the 29th day of August, 1894, of the Board of Directors of the said party of the first part, it was resolved by said Board "that, in consideration" of five dollars and other valuable considerations, the said

corporation will execute and deliver to the Washington Abattoir Company of West Virginia and its successors forever a deed in fee simple (subject to a Trust Deed made by the said Union Stock Yard Company of New Jersey to secure bonds and recorded in Liber 1299, pages 35 and following of the land records of the District of Columbia) of a parcel of ground situate at Benning's in the District of Columbia" and more particularly hereinafter described; and the said Board, at the same time and place, authorized Alvin N. Bastable, president of the said Union Stock Yard Company, "to affix its common seal to the deed hereby directed to be made, to sign the name of this corporation thereto, to attest said signature by signing his own name to said deed in his capacity as president, to acknowledge said deed as the act of this corporation and to deliver the same to the grantee therein," on condition, that said grantee shall surrender a certain lease made by the grantor to the grantee herein and recorded in Liber 1470, folio 249 and following of the land records of the District of Columbia; And whereas, at a regular meeting August 29th, 1894 of the Stockholders of the said "Union Stock Yard Company of New Jersey," it was resolved by said stockholders, "that we do hereby ratify and confirm the action of the Board of directors of this Corporation, on this 29th day of August, ordering and directing the execution of a deed of land to the Washington Abattoir Company of West Virginia. Now, therefore, the said "Union Stock Yard Company of New Jersey" by virtue of the authority conferred on it, by law and in consideration of the premises and the sum of five dollars, the receipt of which is hereby acknowledged and the surrender of the lease hereinbefore mentioned, has granted, bargained, sold and conveyed, and does hereby grant, bargain, sell, and convey, unto and to the use of "The Abattoir Company of West Virginia" and its successors forever, a parcel of ground situate at Bennings in the District of Columbia, being part of the grounds now occupied by the said Union

Stock Yard Company as a stock yard, bounded by a line beginning at the corner formed by the face of the wall on the south side of the branch and the fence on the westerly side of the main alley in said grounds; thence running with the line of the fence south $43\frac{1}{4}^{\circ}$ west two hundred and eighty-three (283) feet to a cedar post; thence north $46\frac{3}{4}^{\circ}$ west one hundred and fifty-two (152) feet to the line between the lands of the Baltimore and Ohio Rail Road Company and those of said Union Stock Yard Company; thence north eastwardly along said line of division about three hundred and nineteen (319) feet to the south side face of the wall of the branch aforesaid; and thence along said wall to the place of beginning; with the easements, rights, ways and appurtenances thereto belonging; And the said Union Stock Yard Company doth also grant, bargain and sell unto the said party of the second part and its successors forever, for the considerations aforesaid, the right of way and passage at any and at all times, for the officers, servants, cattle, horses and vehicles of the said party of the second part and of its patrons and other persons doing business with it, to and from the land so above described and granted, over and by way of the strip of land marked "Drive Way" on the aforesaid plat and described as follows: beginning at the intersection of the south line of Benning's Road and the east line of the land of the Baltimore and Ohio Railroad Company and running thence south-westward along the said east line of said railroad lands to the land above granted; thence south east along the north east line of said land so granted twenty five (25) feet; thence to said Bennings Road on a straight line distant twenty five (25) feet from said Railroad lands and thence westward to the place of beginning. It is expressly understood between the parties hereto, that this deed is made subject to all the provisions of a Trust Deed made by the said Union Stock Yard Company and recorded in Liber 1299, pages 35, 36, 37 and 38 of the Land Records of the District of Columbia, which Trust Deed was made

to secure holders of bonds issued by the said Union Stock Yard Company: To Have and to Hold the same, with the improvements, rights, ways, easements and appurtenances, unto and to the use of the said Washington Abattoir Company, and its successors forever; And the said Union Stock Yard Company doth for itself, its successors and assigns, covenant and agree with the said party of the second part, that it, the said party of the second part and its successors, shall and lawfully may peaceably and quietly have, hold, and enjoy the said parcel of land herein granted, with the easements and appurtenances thereof, with the right of way aforesaid, without let, suit, trouble, molestation, expulsion or interruption by the said party of the first part, its successors or assigns. In testimony whereof, the said Union Stock Yard Company has caused its name to be signed and its corporate seal to be affixed hereto by Alvin N. Bastable its president, this the 20th day of September A. D. 1894, Witness.

UNION STOCK YARD COMPANY
OF NEW JERSEY

[CORPORATE SEAL]

By ALVIN N. BASTABLE

President.

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON, SS:

I, CHARLES S. BUNDY, a Justice of the Peace in and for the District of Columbia aforesaid, hereby certify that Alvin N. Bastable, of Baltimore, Maryland, who is well known to me as the person who executed the foregoing deed, dated, September 20, 1894, for and on behalf of the Union Stock Yard Company a corporation organized under the laws of the State of New Jersey, personally appeared before me in the said City and acknowledged the said deed to be the act and deed of the said Union Stock Yard Company, and the said Bastable, being by me examined, de-

clared that he is the president of the said Union Stock Yard Company that he has executed the foregoing deed under the authority of the stockholders and Board of Directors of said Company and in pursuance of resolutions passed by them respectfully, that he knows the corporate seal of said Company and has affixed it to said deed by order of the said Board and has subscribed his name as a witness to the execution of said deed. Given under my hand and official seal, at Washington City, this 20th day of September A. D. 1894.

CHARLES S. BUNDY, [SEAL]
Justice of the peace D. C.

Plaintiff's Exhibit No. 6

PRE-TRIAL EXHIBIT, R B H, *Judge*

THIS IS TO CERTIFY that the pages attached hereto constitute a full, true, and complete copy of a Trust, by and between, Union Stock Yards Company, Grantors, and Michael A. Keane, et al., Grantees, dated on the 24th day of May, 1906, and recorded on the 29th day of May, 1906, at 10:56 A. M. in Liber No. 3018, Folio 103 as the same appears of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of this office to be affixed, this the 29th day of January A. D. 1951.

MARSHALL L. SHEPARD,
Recorder of Deeds, D. C.

[SEAL]

By ELEANORE DAGUE WILLIAMS,
Deputy Recorder of Deeds.

DEED IN TRUST

Recorded May 29th A. D. 1906—10:56 A. M.

(40)

UNION STOCK YARDS COMPANY

to

KEANE AND AUTH

THIS INDENTURE made this twenty fourth day of May A. D. 1906 by and between the Union Stock Yard Company a corporation duly formed and existing under and by virtue of the laws of the State of New Jersey party of the first part and Michael A. Keane and Nicholas Auth of the City of Washington, District of Columbia parties of the second part, Witnesseth that the said party of the first part in pursuance of a resolution of its stockholders hereto annexed and in consideration of the sum of twelve hundred and fifty dollars (\$1250.00) lawful money of the United States to it in hand paid the receipt whereof is hereby acknowledged has granted bargained sold aliened enfeoffed released and conveyed and by these presents does grant bargain sell alien enfeoff release and convey unto the said parties of the second part all that certain price or parcel of land situate in the District of Columbia known and described as part of tract known as "Fortune Enlarged" and lot five (5) in a division of Joshua Beall's Estate among his heirs at law conveyed to the said Union Stock Yard Company by deed duly recorded among the Land Records of the District of Columbia in liber 1280 at folio 452 and more particularly described as beginning at a cedar post located and described in the deed duly recorded among the Land Records of the District of Columbia in Liber 1946 at folio 283 as being two hundred and eighty three (283) feet from the south wall of the branch and on the west side of the main alley in the said last mentioned deed referred to and running thence north

forty six and three fourths ($46\frac{3}{4}$) degrees west and perpendicular to the line of said Alley one hundred and fifty two (152) feet to the Baltimore and Ohio Railroad Company; thence Southwest along the line of the said Baltimore and Ohio Railroad Company fifty (50) feet; thence south forty six and three fourths ($46\frac{3}{4}$) degrees east parallel with the said first line one hundred and fifty two (152) feet to the west line of the said main alley; thence north forty six and three fourths ($46\frac{3}{4}$) degrees east on the west line of said alley fifty (50) feet to the place of beginning; together with all the rights privileges and appurtenances easements and rights of way to the same belonging or in anywise appertaining but not including the use of any alleys south of the north line of the property hereby conveyed. To Have and to Hold the said land and premises and appurtenances unto and to the only use of the said parties of the second part their heirs and assigns. In Trust Nevertheless for the following uses and purposes that is to say: In Trust to hold the same for the A. Loffler Sausage and Provision Company the T. T. Keane Company and the N. Auth Provision Company Corporations duly formed according to law, and to suffer and permit the said Corporations jointly to have and exercise entire and exclusive control over said real estate with the appurtenances and improvements thereto belonging in such manner as may be mutually agreed upon by the said Corporations. And Further in Trust to sell dispose of encumber and convey the said premises and parcels of real estate and the improvements thereon or any part thereof by deed mortgage deed of trust or otherwise in fee simple or upon less estate to such person or persons or corporation or corporations and upon such terms and conditions as the Board of Directors of the said A. Loffler Sausage and Provision Company the T. T. Keane Company and the N. Auth Provision Company shall by their resolutions jointly direct and require the purchaser or purchasers thereof or persons lending money to be under no obligation to see to the application of the purchase money or money loaned as the case may be; and the pro-

ceeds of any such sale, mortgage, encumbrance or conveyance to pay and distribute as the said A. Loffler Sausage and Provision Company the T. T. Keane Company and the N. Auth Provision Company shall jointly direct, And the said party of the first part covenants that it will warrant specially the property hereby conveyed and that it will execute such further assurances of said land as may be required by the said parties of the second part. And the said party of the first part does hereby make constitute and appoint Alvin N. Bastable its President its true and lawful attorney for it and in its name, and as and for its corporate act and deed to execute and acknowledge this deed before any person having authority under the laws of the District of Columbia to take such acknowledgment. In Testimony Whereof the said party of the first part has caused these presents to be executed in its corporate name by Alvin N. Bastable its President and its corporate seal to be hereunto affixed and attested by its Secretary the day and year first hereinbefore written.

UNION STOCK YARD COMPANY,

By ALVIN N. BASTABLE,

President.

[CORPORATE SEAL]

Signed sealed and delivered

in the presence of

H. CLAY SUTER

Attest JACOB HANN, JR.,

Secretary.

STATE OF MARYLAND,

CITY OF BALTIMORE, to wit:

I GEO. W. HANLENBEEK a Notary Public in and for the City and State aforesaid do hereby certify that Alvin N. Bastable who is personally well known to me to be the person named as attorney in fact in the foregoing and annexed deed bearing date the 24th day of May A. D. 1906

to acknowledge the same personally appeared before me in the City and State aforesaid and as attorney in fact as aforesaid and by virtue of the power and authority in him vested by the said deed did acknowledge the same to be the act and deed of the Union Stock Yard Company and did deliver the same as such; and that Jacob Hann Jr. who is personally well known to me to be the Secretary of the said Union Stock Yard Company did appear before me in the City and State aforesaid and deposes and says that he is the Secretary of the said Union Stock Yard Company that he knows the corporate seal of said Company and that the seal affixed to the foregoing deed is the corporate seal of said Company, that it was affixed thereto and the said deed is executed by virtue of and under the authority of a resolution of the Stockholders of said Company and attested copy of which is hereto annexed. Given under my hand and official seal this twenty fourth day of May A. D. 1906.

[NOTARIAL SEAL]

GEO. W. HANLENBEEK,
Notary Public.

At a meeting of the Stockholders of the Union Stock Yard Company duly held at office of Company Camden N. J. March 9th 1906 the following proceedings were among others had: On motion of Mr. E. B. Shriver seconded by Mr. A. N. Bastable it was resolved by the following Stock vote: A. N. Bastable 262 shares J. Hann Jr. 50 shares, Mary F. Garrett 140 shares R. D. Lankford 140 Shares E. B. Shriver 50 shares and T. B. Shriver 135 shares that the proposition of Messrs. Michael A. Keane and Nicholas Auth surviving trustees to purchase all that certain real estate situate at Bennings in the District of Columbia known and described as "All that certain piece or parcel of land, situate in the District of Columbia known and described as part of tract known as "Fortune Enlarged" and lot five (5) in a division of Joshua Beall's Estate among his heirs at law conveyed to the same Union Stock Yard Company by deed duly recorded among the Land

Records of the District of Columbia in Liber 1280 at folio 452 and more particularly described as beginning at a cedar post located and described in the deed duly recorded among the Land Records of the District of Columbia in Liber 1946 at folio 283 as being 283 feet from the south wall of the branch and on the west side of the main alley in said last mentioned deed referred to and running thence north $46\frac{3}{4}$ degrees west and perpendicular to the line of said alley 152 feet to the Baltimore & Ohio Railroad Company; thence southwest along the line of the said Baltimore & Ohio Railroad Company fifty (50) feet; thence south $46\frac{3}{4}$ degrees east parallel with the said first line 152 feet to the west line of the said main alley; thence - - - north $46\frac{3}{4}$ degrees east on the west line of said Alley 50 feet to the place of beginning; for the sum of one thousand two hundred and fifty dollars (1250.00) and which said proposition the Board of Directors of this Company accepted subject to the ratification by its stockholders be accepted ratified and confirmed. And it is further resolved that this Company sell assign transfer and convey unto the said Michael A. Keane and Nicholas Auth surviving trustees said real estate as aforesaid in fee simple together with all the rights privileges and appurtenances for the sum of one thousand two hundred and fifty dollars (1250.00) to be paid in Cash. That Alvin N. Bastable President be and he is hereby authorized and empowered for and in the name of this Company and as its attorney in fact to execute and acknowledge all necessary deeds and conveyances for the proper and effectual conveyance of the said real estate rights and easements and that the Secretary of this Company is hereby authorized to attest the same with the corporate seal of this Company.

A true Copy,

JACOB HANN JR., [CORPORATE SEAL]
*Secretary Union Stock Yard
 Company.*

Plaintiff's Exhibit No. 7

THIS IS TO CERTIFY that the pages attached hereto constitute a full, true, and complete copy of a Trust, by and between, Washington Abattoir Co., of West Virginia, Grantors, and Andrea Loffler, et al., Grantees, dated on the 31st day of December, 1904, and recorded on the 3rd day of January, 1905, at 1:01 P. M. in Liber No. 2893, Folio 177 as the same appears of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of this office to be affixed, this the 8th day of February A. D. 1951.

MARSHALL L. SHEPARD,
Recorder of Deeds, D. C.

[SEAL]

By A. OLIVER THORNTON,
Deputy Recorder of Deeds.

DEED IN TRUST

Recorded Jan. 3, 1:01 P. M. 1905 (38)

WASHINGTON ABATTOIR CO. OF WEST VIRGINIA

to

ANDREAS LOFFLER, et al

THIS INDENTURE made this thirty first day of December A. D. 1904 by and between the Washington Abattoir Company of West Virginia, a corporation duly formed and existing under and by virtue of the laws of the State of West Virginia, party of the first part and Andreas Loffler, Michael A. Keane and Nicholas Auth, of the City of Washington, District of Columbia, parties of the second part. Witnesseth that the said party of the first part in pursuance of a resolution of its stockholders hereto annexed, and in consideration of the sum of Twelve Thousand five hundred dollars (\$12,500.00) lawful money of the United States to it in hand paid the receipt whereof is

hereby acknowledged, and the assumption by the said parties of the second part, of the payment of an indebtedness of Twenty Five Thousand dollars (\$25,000.00) secured by an incumbrance upon the hereinafter described property, has granted, bargained, sold, aliened, enfeofed, released and conveyed, and by these presents does grant, bargain, sell, alien, enfeof, release, and convey unto the said parties of the second part, all that certain piece or parcel of land situate in the District of Columbia and described as all those parcels situate at Bennings in said District bounded by a line beginning at the corner formed by the face of the wall on the south side of the branch and the fence on the westerly side of the main alley in the grounds owned by the Union Stock Yards Company and running thence with the line of the fence south forty three and one quarter ($43\frac{1}{4}$) degrees, West two hundred and eighty three (283) feet to a cedar post thence north forty six and three quarters ($46\frac{3}{4}$) degrees, West one hundred and fifty two (152) feet to the line between the lands of the Baltimore and Ohio Railroad Company and those of the Union Stock Yards Company, thence northeast along said line of division about three hundred and nineteen (319) feet to the south side face of the wall of the branch aforesaid thence along said wall to the place of beginning being the same property conveyed by the Union Stock Yards Company to the Washington Abattoir Company, by deed bearing date the 20th day of September A. D. 1894 and recorded September 22 1894 in Liber 1946 at folio 283 of the Land Records of the District of Columbia, together with all the rights, privileges, and appurtenances, and rights of way, and easements therein and thereby, secured and conveyed, together with all the rights, privileges, appurtenances, easements, and rights of way to the same belonging or in anywise appertaining, and all the improvements, machinery, fixtures and paraphernalia of trade thereon erected and therein contained, and constituting and being the abattoir and cold storage plant of the said party

of the first part at Bennings in the District as aforesaid. To Have and to Hold the said land and premises and appurtenances machinery, fixtures and paraphernalia of trade unto and to the only use of the said parties of the second part, their heirs and assigns. In Trust Nevertheless For The Following Uses and Purposes, that is to say: In Trust to hold the same for the A. "Loffler Sausage and Provision Company, the T. T. Keane Company and the N. Auth Provision Company corporations duly formed according to law, and to suffer and permit the said corporations jointly to have and exercise entire and exclusive control over said real estate with the appurtenances and improvements thereto belonging in such manner as may be mutually agreed upon by the said corporations. And Further In Trust to sell, dispose of, incumber and convey the said premises and parcels of real estate and the improvements thereon, or any part thereof, by deed, mortgage, deed of trust or otherwise, in fee simple or upon less estate to such person or persons, or corporation or corporations, and upon such terms and conditions as the Board of Directors of the said A. "Loffler Sausage and Provision Company, the T. T. Keane Company and the N. Auth Provision Company shall by their resolutions jointly, direct and require, the purchaser or purchasers thereof, or persons lending money, to be under no obligation to see to the application of the purchase money, or money loaned as the case may be; and the proceeds of any such sales, mortgage, incumbrance or conveyance, to pay and distribute as the said A. Loffler Sausage and Provision Company, the T. T. Keane Company and the N. Auth Provision Company shall jointly direct. And the said party of the first part covenants that it will warrant specially the property hereby conveyed and that it will execute such further assurances of said land, improvements, machinery fixtures and paraphernalia of trade, as may be required by the said parties of the second part. And the said party of the first part does hereby make constitute and appoint Alvin

N. Bastable its President, its true and lawful attorney, for it and in its name, and as and for its corporate act and deed to execute and acknowledge this deed before any person having authority under the laws of the District of Columbia to take such acknowledgment. In Testimony Whereof the said party of the first part has caused these presents to be executed in its corporate name by Alvin N. Bastable its President, and its corporate seal to be hereunto affixed and attested by its Secretary, the day and year first hereinbefore written.

WASHINGTON ABATTOIR COMPANY OF
WEST VIRGINIA,

By ALVIN N. BASTABLE, *President*.

[CORPORATE SEAL]

Attest W. W. NAIRN, *Secretary*.

Signed sealed and delivered
in the presence of
E. G. THOMPSON.

DISTRICT OF COLUMBIA, ss:

I ERNEST G. THOMPSON a Notary Public in and for the District aforesaid, do hereby certify that Alvin N. Bastable who is personally well known to me to be the person named as attorney in fact in the foregoing and annexed deed dated the 31st day of December A. D. 1904 to acknowledge the same, personally appeared before me in the District aforesaid, and as attorney in fact as aforesaid, and by virtue of the power and authority in him vested by the said deed, did acknowledge the same to be the act and deed of the Washington Abattoir Company of West Virginia, and did deliver the same as such; and that W. W. Nairn who is personally well known to me to be the Secretary of the said Washington Abattoir Company of West Virginia, did appear before me in the District aforesaid, and deposes and says that he is the Secretary of the said

Washington Abattoir Company of West Virginia; that he knows the corporate seal of said company and that the seal affixed to the foregoing deed is the corporate seal of the said Company that it was affixed thereto, and the said deed is executed by virtue, and under the authority of a resolution of the stockholders of said Company, an attested copy of which is hereto annexed. Given under my hand and official seal this Thirty-first day of December A. D. 1904.

[NOTARIAL SEAL]

ERNEST G. THOMPSON,
Notary Public, D. C.

My Commission will expire April 3rd, 1906.

At a meeting of the stockholders of the Washington Abattoir Company of West Virginia duly held December 29th, 1904, at Bennings, District of Columbia the following proceedings were, among others, had: On motion of Mr. Thos. B. Shriver and seconded by Mr. E. D. Evans it was resolved by the following stock vote.

N. Auth	85	Shares	Brought Forward	495
A. N. Bastable	194	"	M. A. Keane	10
J. H. Busher	20	"	A. Loeffler	95
E. B. Evans	95	"	Saml. Sundeheimer	3
R. Horning	6	"	Thos. B. Shriver	46
Estate T.T. Keane	95	"	J. Hann Jr.	120
Carried forward	495		Total	769

that the proposition of Messrs. Andreas Loeffler, Michael A. Keane and Nicholas Auth, on behalf of, and as trustees of the A. Loeffler Sausage and Provision Co., the T. T. Keane Company and the N. Auth Provision Co., to this company, which proposition is as follows:

“Washington, D. C. December 29” 1904.

To the Washington Abattoir Company of West Virginia.

Gentlemen:—

We the undersigned, on behalf of, and as trustees for The A. Loeffler Sausage and Provision Co., the T. T. Keane *Keane* Company, and the N. Auth Provision Co., do hereby propose to purchase from you your abattoir and cold storage plant located at Bennings, D. C., together with all the lands, rights of way, easements, rights and privileges and appurtenances belonging and appertaining thereto and connected therewith, and all the improvements, machinery, fixtures, and paraphernalia of trade therein contained, the said land being particularly described in a certain deed from the Union Stock Yard Company to the Washington Abattoir Company, dated September 20, 1894 and recorded September 22, 1894 in Liber 1946 at folio 283 of the Land Records of the District of Columbia. We propose to purchase said property for the sum of Thirty seven thousand five hundred dollars (\$37,500.00) paying Twelve thousand five hundred dollars (\$12,500.00) in cash and assuming the payment of a deed of trust from the Washington Abattoir Company to Alvin N. Bastable and James E. Clarke dated September 29th, 1894 and recorded upon the same day in Liber 1959 at folio 7 of the Land Records of the District of Columbia, to secure the sum of Twenty five thousand dollars (\$25,000.00), represented by one hundred (100) bonds each for the sum of Two Hundred and fifty dollars (\$250.00), bearing interest at the rate of 6% per annum, payable semi-annually, said bonds being due and payable on the first (1) day of October, 1909. We are advised that the real estate, improvements, and plant which we desire to purchase is with other property belonging to the Union Stock Yard Company subject to a mortgage executed by the said Union Stock Yard Company to Martin and Bastable, bearing date the first (1) day of

January 1888 and recorded January 3, 1888 in Liber 1299 folio 35 of the Land Records of the District of Columbia securing the sum of Fifty Thousand dollars (\$50,000.00) represented by a series of two hundred (200) bonds each bond of Two Hundred and fifty dollars (\$250.00) numbered one (1) to two hundred (200); of which it is represented to us bonds securing Thirty Thousand dollars (\$30,000.00) have been liquidated and paid and such of said bonds as remain will be liquidated and paid as they mature by the mortgagor; and that the portion of the said real estate covered by said mortgage other than the real estate which we propose to purchase will be sufficient security to liquidate the unpaid portion of said bonds in the event of the failure of the mortgagor to pay the same, and as part of the condition of the acceptance of this proposition, a certificate is to be obtained from the said mortgagees or other satisfactory evidence is to be presented to us or our attorney, showing that the said Thirty thousand dollars (\$30,000) bonds have been so liquidated and paid. The title to said property to be a good unincumbered record title excepting however the liens of the deed of trust for Twenty five thousand dollars (\$25,000.00), the payment of which we, as aforesaid, agree to assume, and the said mortgage securing bonds aggregating \$50,000.00 above referred to. The taxes upon the said real estate and improvements and interest on the Twenty five thousand dollars (\$25,000.00) deed of trust to be paid by you to the date of conveyance."

Very Respectfully,

(Signed) NIKOLAUS AUTH,

(Signed) MICHAEL KEANE,

(Signed) ANDREAS LOFFLER,

and which said proposition the Board of Directors of this Company accepted subject to the ratification by its stockholders, be accepted, ratified and confirmed and it is

further resolved that this Company sell, assign, transfer and convey unto the said Andreas Loeffler, Michael A. Keane and Nicholas Auth, for the benefit of and in trust for the A. Loeffler Sausage and Provision Co., the T. T. Keane Co., and the N. Auth Provision Co., the abattoir and cold storage plant located at Bennings D. C., together with all the lands, rights of way, easements, rights, privileges and appurtenances belonging and appertaining thereto, and connected therewith and all the improvements, machinery, fixtures and paraphernalia of trade therein contained, the said land being particularly described as all those parcels situate at Bennings in the District of Columbia, bounded by a line beginning at the corner formed by the face of the wall on the south side of the branch and the fence on the westerly side of the main alley in the grounds owned by the Union Stock Yard Company and running thence with the line of the fence south forty three and one quarter ($43\frac{1}{4}$) degrees, West Two Hundred and eighty three (283) feet to a cedar post, thence north forty six and three quarters ($46\frac{3}{4}$) degrees, West One Hundred and fifty two (152) feet to the line between the lands of the Baltimore and Ohio Railroad Company and those of the Union Stock Yard Company, thence North east along said line of division about three hundred and nineteen (319) feet to the south side face of the wall of the branch aforesaid, thence along said wall to the place of beginning, being the same property conveyed by the Union Stock Yard Company to the Washington Abattoir Company by deed bearing date the 20th day of September, 1894 and recorded September 22, 1894 in Liber 1946 at folio 283 of the Land Records of the District of Columbia, together with all the rights, privileges and appurtenances and rights of way and easements therein and thereby, secured and conveyed, for the sum of Thirty seven thousand five hundred dollars (\$37,500.00) Twelve Thousand and five hundred dollars (\$12,500.00) of the said purchase money to be paid in cash,

and the indebtedness secured by the deed of trust bearing date the 29th day of September, 1894, executed by this Company to Messrs. Alvin N. Bastable and James E. Clark, recorded in Liber 1957 folio 7 of the Land Records of the District of Columbia, conveying said real estate and improvements, to be assumed by the said purchasers; and that Alvin N. Bastable be and he is hereby authorized and empowered for and in the name of this Company, and as its attorney in fact to sign, execute and acknowledge all necessary deeds and conveyances for the proper and effectual conveyance of the said real estate improvements, rights, easements, machinery and fixtures as aforesaid, and that the Secretary of this Company is hereby authorized to attest the same with the corporate seal of this Company.

A True Copy,

[SEAL OF WASHINGTON ABATTOIR
COMPANY OF W. VA.]

W. W. NAIRN,
Secretary.

Plaintiff's Exhibit No. 8

PRE-TRIAL EXHIBIT, R B H, *Judge*

THIS IS TO CERTIFY that the pages attached hereto constitute a full, true, and complete copy of a Trust Mortgage, by and between, Union Stock Yard Company, Grantors, and American Security and Trust Company, Grantees, dated on the 1st day of January, 1910, and recorded on the 4th day of January, 1910, at 9:58 A. M. in Liber No. 3271, Folio 475 as the same appears of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of this office to be affixed, this the 29th day of January A. D. 1951.

MARSHALL L. SHEPARD,
Recorder of Deeds, D. C.

[SEAL]

By ELEANORE DAGUE WILLIAMS,
Deputy Recorder of Deeds.

THIS INDENTURE OF MORTGAGE, Made this first day of January nineteen hundred and ten, Between Union Stock Yard Company a Corporation organized under the laws of the State of New Jersey hereinafter called the Mortgagor, party of the first part, and American Security and Trust Company a corporation organized under the act of Congress, doing business at Washington, in the District of Columbia, hereinafter called the Trustee, party of the second part, WHEREAS,

* * * * *

it is necessary and advisable for the proper conduct of the business of this Company, to raise money by an issue of bonds secured by a first mortgage upon its real estate situate at Bennings in the District of Columbia. THEREFORE, BE IT RESOLVED that the Board of Directors be and they are hereby authorized and empowered to create and indebtedness of this Company to the amount of Forty Thousand Dollars, represented by its corporate bonds, secured by a mortgage made to the American Security and Trust Company, doing business at Washington in the District of Columbia, upon its lands and real estate situate at Bennings in said District, described as follows: Beginning at the southwest corner of Anacostia and Bennings Roads; thence following the west side of Anacostia Road south 22° west 519.31 feet; thence south 28° 12' 30" west 374.78 feet; thence leaving said road north 64° 23' west 675.24

feet to the right of way of the B. & O. Railroad (Alexandria Branch) thence with said right of way north $38^{\circ} 52'$ east 341.12 - - - feet to the land of the Washington Abattoir; thence south $50^{\circ} 39'$ east 152 feet to the line of an alley or road thence with said alley north $39^{\circ} 21'$ each 334.9 feet to the north face of a stone wall; thence following said wall north $37^{\circ} 42'$ west 146.32 feet to the right of way of the B. & O. railroad; thence following said right of way north $43^{\circ} 59' 30''$ east 121.18 feet to the south line of Bennings Road; thence with said road south $78^{\circ} 10' 30''$ east 395.08 feet; thence south $61^{\circ} 11' 30''$ east 63.05 feet to the place of beginning.

* * * * *

That the form of said mortgage, dated the first day of January nineteen hundred and ten, now submitted to this Board covering, lands and real estate of this Company situate at Bennings in the District of Columbia and the terms and conditions thereof, be and the same are hereby approved and adopted, and the President of this Company is authorized to execute said bonds and to affix the corporate seal thereto, the Secretary attesting such execution, and the President is authorized for and on behalf of this Company, to execute said mortgage and to affix the corporate seal thereto and acknowledge and deliver the same, as required by law, the said Secretary to attest its execution and cause the same to be recorded.

* * * * *

That the said Union Stock Yard Company does hereby appoint Alvin N. Bastable as its Attorney for it and on its behalf to acknowledge said mortgage as its act and deed. All of which will more fully and at large appear by reference to the minutes of said meeting of said Board of Directors. Now, THIS INDENTURE WITNESSETH, that the said mortgagor as well for and in consideration of the premises and for the better securing of the payment of

the above mentioned bonds made and issued for the purpose, in the manner and to the amount hereinbefore described, and the interest which may accrue thereon, as for and in consideration of the sum of One Dollar, lawful money of the United States unto it well and truly paid by said Trustee, at and before the sealing and delivery thereof, the receipt whereof, is hereby acknowledged hath granted, bargained, sold, aliened, enfeoffed, conveyed, released and confirmed, and by these presents does grant, bargain, sell, alien, enfeoff, convey release and confirm unto the said Trustee, its successors and assigns; ALL that certain tract or parcel of land with the buildings and improvements thereon erected, situate at Bennings, in the District of Columbia, aforesaid, bounded and described as follows: Beginning for the same at the southwest corner of Anacostia and Bennings Roads, thence following the west side of Anacostia Road south 22° west 519.31 feet; thence south $28^{\circ} 12' 30''$ west 374.78 feet; thence leaving said road north $64^{\circ} 23'$ west 675.24 feet to the right of way of the B & O Railroad (Alexandria Branch) thence with said right of way north $38^{\circ} 52'$ east 341.12 feet to the land of the Washington Abbatoir; thence south $50^{\circ} 39'$ east 152 feet to the line of an alley or road; thence with said alley north $39^{\circ} 21'$ east 339.9 feet to the north face of a stone wall; thence following said wall north $37^{\circ} 42'$ west 146.32 feet to the right of way of the B&O Railroad; thence following said right of way north $43^{\circ} 59' 30''$ east 121.18 feet to the south line of Bennings Road; thence with said road south $78^{\circ} 10' 30''$ east 395.08 feet; thence South $61^{\circ} 11' 30''$ east 63.05 feet to the place of beginning. Together with all and singular the improvements, ways, waters, rights, liberties, privileges, hereditaments, appurtenances and equipment to the above mentioned property belonging or in anywise appertaining, and all the reversions and remainders of rents, issues and profits thereof and all estate right, title, interest property claim, and demand whatsoever, of the said Mortgagor and its successors and assigns,

of in and to the same and every part thereof. To HAVE AND TO HOLD the same unto the said Trustee, its successors and assigns, to and for the only proper use and behoof of the said Trustee, its successors and assigns, IN TRUST * * * for the use, benefit and security, * * * of the several * * * holders of the said bonds

* * * * *

If the said mortgagor, its successors or assigns, shall at any time hereafter omit, neglect or refuse, for a period exceeding three months, to pay the interest on the bonds entitled to be hereby secured, or any of them, after the said interest shall have fallen due according to the terms of said bonds, or shall omit, neglect or refuse for a period exceeding three months to pay the principal on the afore-said bonds, or any of them, after the principal shall have fallen due according to the terms of said bonds, or shall omit, neglect or refuse for a period exceeding three months to carry out and perform any other covenant, promise condition or agreement herein required to be performed or kept by it, then and in any or either of such cases, upon the written request only of the holders of one third of the said bonds then outstanding, the Trustee or its successors in the trust, for the time being, shall proceed to sell and dispose of all and singular the said real estate, rights, improvements, and premises hereby mortgaged or agreed so to be, to the highest and best bidder at public auction on the premises or at such place as the said Trustees may designate upon such times as it may deem wise and advantageous, and at such time as it shall appoint

* * * * *

If the Mortgagor * * * shall * * * pay, or cause to be paid, * * * the several and respective sums expressed therein at the same time and places hereinbefore mentioned, for payment, * * * then * * * the trustee hereunder shall release and discharge this indenture by proper instrument

* * * * *

IN WITNESS WHEREOF, the said Mortgagor has caused its corporate seal to be hereunto affixed and these presents to be signed by its President and attested by its Secretary the day and year first above written.

UNION STOCK YARD COMPANY,

By ALVIN N. BASTABLE,

President.

[UNION STOCK YARD COMPANY
CORPORATE SEAL]

Signed, sealed and delivered
in the presence of

Attest: J. HANN JR, *Secretary.*

American Security and Trust Company, the Trustee named in the foregoing mortgage, hereby accepts the trusts therein mentioned.

IN WITNESS WHEREOF, the said Company has caused its corporate seal to be hereto affixed and these presents to be signed by its Vice president and attested by its Secretary the third (3rd) day of January nineteen hundred and ten.

AMERICAN SECURITY & TRUST COMPANY,

By CORCORAN THOM,

Vice President.

[AMER SEC & TR Co
CORPORATE SEAL]

Signed, sealed and delivered
in the presence of

Attest:

CHAS E. HOWE, *Tr.*

Attest:

_____, *Secretary.*

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON, To Wit:

I HARRY W. FINNEY a Notary Public in and for the District of Columbia do hereby certify that the Union Stock Yard Company, the party of the first part, and mortgagor named in a certain indenture of mortgage bearing date the first day of January, nineteen hundred and ten, and hereunto annexed, personally appeared before me, in the City and District aforesaid, by Alvin N. Bastable, its duly constituted attorney, said Alvin N. Bastable being personally well known to me to be such attorney, and then and there acknowledged said indenture of mortgage to be the act and deed of the said Union Stock Yard Company. Given under my hand and official seal this 3rd day of January 1910. nineteen hundred and ten.

[NOTARIAL SEAL]

HARRY W. FINNEY,
Notary Public D. C.

Plaintiff's Exhibit No. 9

PRE-TRIAL EXHIBIT, R B H, *Judge*

THIS IS TO CERTIFY that the pages attached hereto constitute a full, true, and complete copy of a Deed, by and between Andrew D. Loffler, et al., Trustees, Grantors, and the Washington Abattoir Company, Inc., Grantees, dated on the 22nd day of May, 1916, and recorded on the 25th day of May, 1916, at 3:00 P. M. in Liber No. 3869, Folio 275 as the same appears of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of this office to be affixed, this the 29th day of January A. D. 1951.

MARSHALL L. SHEPARD,
Recorder of Deeds, D. C.

[SEAL]

By ELEANORE DAGUE WILLIAMS,
Deputy Recorder of Deeds.

THIS DEED, Made this Twenty second day of May in the year one thousand nine hundred and sixteen, by and between Andrew D. Loffler and Michael A. Keane, as Trustees under deed-in-trust recorded among the Land Records of the District of Columbia in Liber No. 3811, folio 354 and acting under resolutions respectively of the A. Loffler Sausage & Provision Company, Inc. of the District of Columbia, and the T. T. Keane Company, Inc. of the D. of C. Said resolutions hereunto attached, parties of the first part, and The Washington Abattoir Company, a Corporation, incorporated under the laws of the District of Columbia, party of the second part:

WITNESSETH, That in consideration of Fifty thousand (\$50,000) Dollars, the parties of the first part do grant unto the party of the second part, in fee simple, all those piece or parcel of land in the District of Columbia, described as follows, to wit:

Part of the tract of land called "Fortune Enlarged" and part of lot 5 in the division of the Estate of Joshua Beall among his heirs, being part of the tract of land known as "Fife & Fife Enlarged" and being part of the land conveyed to Union Stock Yard Company by deed recorded among the Land Records of the District of Columbia in Liber No. 1280, folio 452, and being described as follows, in one parcel:

Beginning for the same at a corner formed by the face of the wall on the South side of a branch and a fence on

the Westerly side of the main alley on the grounds formerly owned by said Union Stock Yard Co., and running thence with the line of said fence, South $43\frac{1}{4}$ degrees West, 283 feet to a cedar post; thence North $46\frac{3}{4}$ degrees West 152 feet to the land of the Baltimore & Ohio Railroad Co.; thence Northeasterly along the line of the land of said Railroad Co. about 319 feet to the South face of said wall on the South side of said branch; and thence along said face of said wall, South $32\frac{3}{4}$ degrees East, to the point of beginning. With right of way over the following described parcel of land: Beginning for the same at the intersection of the South line of Bennings Road with the Easterly line of the land of the Baltimore & Ohio Railroad Co. and running thence Southwesterly along said easterly line of the land of said Railroad Co., to the Northerly line of the parcel of land above described; thence Southeasterly along the Northeasterly line of the land above described, 25 feet; thence Northeasterly in a straight line to the Southerly line of the Bennings Road, and distant 25 feet from the Easterly line of the land of said Railroad Co. and thence Westerly to the point of beginning. Being same land conveyed to the Washington Abattoir Co. by deed recorded among said Land Records in Liber No. 1946 folio 283. Subject to the sewer privilege granted the District of Columbia by said Keane & Loeffler, Trustees, by deed dated March 1, 1916, and recorded in Liber 3864 folio 293 of said Land Records;

Also part of said tract of land called "Fortune Enlarged" described as follows:—Beginning for the same at the Cedar post located and described in deed to the Washington Abattoir Company, recorded in Liber 1946 folio 283 of the Land Records of the District of Columbia, as being 283 feet from the South face of the wall of a branch and on the West side of a main alley, and running thence North $46\frac{3}{4}$ degrees West and perpendicular to the line of said main alley, 152 feet to the easterly line of the land

of the Baltimore and Ohio Railroad Co., thence Southwesterly along the said easterly line of the land of said Railroad Co. 50 feet; thence South 46-3/4 degrees east parallel with the first line, 152 feet to the Westerly line of said main alley; and thence along the said Westerly line of said main alley, North 46-3/4 degrees East, 50 feet to the point of beginning.

Together with the improvements, rights, privileges, and appurtenances to the same belonging.

AND the said parties of the first part covenant that they will warrant specially the property hereby conveyed; and that they will execute such further assurances of said land as may be requisite.

WITNESS our hands and seals the day and year first hereinbefore written.

ANDREW D. LOFFLER [SEAL]
Trustee.

MICHAEL A. KEANE [SEAL]
Trustee.

In presence of—

S. DUNCAN BRADLEY

as to A. D. L. and M. A. K.

* * * * *

DISTRICT OF COLUMBIA, to wit:

I, S. Duncan Bradley a Notary Public in and for the District of Columbia, Do Hereby Certify that Andrew D. Loeffler and Michael A. Keane, Trustees under deed-in-trust as described in the deed hereunto attached of the District of Columbia, parties to a certain Deed bearing date on the 22d day of May, 1916, and hereto annexed, personally appeared before me in said District, the said Andrew D. Loeffler and Michael A. Keane being personally well known to me as the persons who executed the said Deed, and acknowledged the same to be their act and deed.

GIVEN under my hand and seal this 23rd day of May, 1916.

[NOTARIAL SEAL]

S. DUNCAN BRADLEY,
Notary Public, D. C.

Plaintiff's Exhibit No. 10
PRE-TRIAL EXHIBIT, R B H, *Judge*

THIS IS TO CERTIFY that the pages attached hereto constitute a full, true, and complete copy of a Deed, by and between, Union Stock Yard Company of New Jersey, Grantors, and A. Loffler Provision Company, Inc., Grantees, dated on the 22nd day of June, 1928, and recorded on the 23rd day of June, 1928, at 10:48 A. M. in Liber No. 6172, Folio 35 as the same appears of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of this office to be affixed, this the 29th day of January A. D. 1951.

MARSHALL L. SHEPARD,
Recorder of Deeds, D. C.

[SEAL]

By ELEANORE DAGUE WILLIAMS,
Deputy Recorder of Deeds.

DEED

Recorded June 23, 1928, at 10:48 A. M. No. 47

THIS DEED, made this 22nd day of June in the year Nineteen hundred and twenty-eight, by and between Union Stock Yard Company of New Jersey, a body corporate duly incorporated under the laws of the State of New Jersey, acting herein pursuant to a Resolution of its Stockholders (all of the Directors being present and voting) a duly certified copy of which Resolution is hereunto annexed and made part of these presents, party hereto of the first part,

A. Loffler Provision Company, Inc., a body corporate duly incorporated under the laws in force in the District of Columbia, party hereto of the second part:

WITNESSETH, that the said party of the first part, for and in consideration of the sum of Ten Dollars to it paid by the said party of the second part, does hereby grant and convey unto the said party of the second part, in fee simple, the following described land and premises, with the improvements, easements, and appurtenances thereunto belonging, situate and being in the County of Washington in the District of Columbia, namely: Part of the tract of land called "Fortune Enlarged" and part of Lot Five (5) in the division of the estate of Joshua Beall among his heirs, being part of the tract of land known as "Fife" and "Fife Enlarged", and being part of the land conveyed to Union Stock Yard Company by Deed recorded in Liber 1280 folio 452 of the Land Records of the District of Columbia, described in accordance with a survey by the Surveyor of the District of Columbia recorded in Survey Book No. 94 page 497 of the Records of the Office of the Surveyor of the District of Columbia, as follows:—Beginning for the same at a corner formed by the North face of the wall on the South side of a Branch at a fence on the Westerly side of the main alley on the grounds formerly owned by the Union Stock Yard Company, said point being also the most Easterly corner of the land conveyed to the Washington Abattoir Company, a corporation incorporated under the laws of the District of Columbia, by Deed recorded in Liber 3869 folio 275 of said Land Records, and running thence North Thirty-seven (37) degrees forty-two (42) minutes West along said wall, Seventy-seven and ninety-eight hundredths (77.98) feet; thence North Forty (40) degrees fifty-nine (59) minutes East, Sixteen and fourteen hundredths (16.14) feet; thence South Seventy-six (76) degrees forty-three (43) minutes East, Thirteen and fifty-seven hundredths (13.57) feet; thence South Thirty-seven (37) de-

grees forty-two (42) minutes East, Sixty-five (65) feet; thence South Thirty-nine (39) degrees twenty-one (21) minutes West, Twenty-five (25) feet to the place of beginning.

To have and to hold, the said land and premises, with the improvements, easements and appurtenances, unto and to the use of the said party hereto of the second part in fee simple.

And the said party hereto of the first part, does hereby covenant to warrant specially the property hereby conveyed, and to execute such further assurances of said land as may be requisite.

IN TESTIMONY WHEREOF, on the day and year first hereinabove written, the said Union Stock Yard of New Jersey, has caused these presents to be signed with its Corporate name by A. O. Dille its President, attested by J. F. Kelle its Secretary and its Corporate Seal to be hereunto affixed, and does hereby constitute and appoint A. O. Dille, its true and lawful Attorney in fact for it and in its name to appear before any officer authorized by law to take and certify acknowledgments of conveyances of land in the District of Columbia, and then and there to acknowledge and deliver these presents as its act and deed.

[CORPORATE SEAL]

UNION STOCK YARD OF NEW JERSEY,
By A. O. DILLE, *President*.

Attest J. F. KELLE, *Secretary*.

At a meeting of the Stockholders (all of the Directors being present and voting) of Union Stock Yard Company of New Jersey, held on the 18th day of June 1928, the following Resolution was adopted:—

“Resolved, that the President of this corporation be and he is hereby authorized and directed to accept the offer of A. Loffler Provision Company, Inc. to purchase the following described property:—

Part of the tract of land called "Fortune Enlarged" and part of Lot 5 in the division of the estate of Joshua Beall among his heirs, being part of the tract of land known as "Fife" and "Fife Enlarged", and being part of the land conveyed to Union Stock Yard Company by Deed recorded in Liber 1280 folio 452 of the Land Records of the District of Columbia, described in accordance with a survey by the Surveyor of the District of Columbia recorded in Survey Book No. 94 page 497 of the Records of the Office of the Surveyor of the District of Columbia, as follows:—Beginning for the same at a corner formed by the North face of the wall on the South side of a Branch at a fence on the Westerly side of the main alley on the grounds formerly owned by the Union Stock Yard Company, said point being also the most Easterly corner of the land conveyed to the Washington Abattoir Company, a corporation incorporated under the laws of the District of Columbia, by Deed recorded in Liber 3869 folio 275 of the said Land Records, and running thence North 37 degrees 42 minutes West along said wall, 77.98 feet; thence North 40 degrees 59 minutes East, 16.14 feet; thence South 76 degrees 43 minutes East, 13.57 feet; thence South 37 degrees 42 minutes East, 65 feet; thence South 39 degrees 21 minutes West, 25 feet to the place of beginning,—situate in the County of Washington, D. C., and owned by this corporation; and that the President be and he is hereby authorized and directed to execute and deliver in the name of this corporation, a Deed sufficient and adequate to convey the said real estate in fee simple to the said A. Loffler Provision Company, Inc. on compliance by it with the terms of said offer."

THIS IS TO CERTIFY that the foregoing is a true copy of the Resolution adopted by the Stockholders (all of the Directors being present and voting) of the Union Stock Yard Company of New Jersey, at a meeting held on the 18th day of June 1928.

[CORPORATE SEAL]

J. F. KELLS, *Secretary.*

DISTRICT OF COLUMBIA, to wit:

I, Arthur S. Cudmore a Notary Public in and for the District aforesaid, do hereby certify that A. O. Dille who is personally well known to me to be the person named as Attorney in fact in the foregoing and annexed Deed dated the 22nd day of June A. D. 1928, to acknowledge the same personally appeared before me in the District aforesaid, and as Attorney in fact as aforesaid, and by virtue of the power and authority in him vested by the aforesaid Deed, acknowledged the same to be the act deed of Union Stock Yard Company of New Jersey, a Corporation grantor therein, and delivered the same as such.

Given under my hand and official seal, this 22nd day of June A. D. 1928.

[NOTARIAL SEAL]

ARTHUR S. CUDMORE,
Notary Public, D. C.

Plaintiff's Exhibit No. 11

PRE-TRIAL EXHIBIT, R B H, *Judge*

THIS IS TO CERTIFY that the pages attached hereto constitute a full, true, and complete copy of a Deed, by and between, A. Loffler Provision Company, Inc., grantors, and Keane-Loffler, Inc., Grantees, dated on the 6th day of July, 1928, and recorded on the 6th day of July, 1928, at 2:38 P. M. in Liber No. 6177, Folio 261 as the same appears of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of this office to be affixed, this the 9th day of January A. D. 1951.

MARSHALL L. SHEPARD,
Recorder of Deeds, D. C.

[SEAL]

By ELEANORE DAGUE WILLIAMS,
Deputy Recorder of Deeds.

Recorded July 6, 1928, at 2:38 P. M. No. 133

DEED

THIS DEED made this 6th day of July, in the year Nineteen hundred and twenty-eight, by and between A. Loffler Provision Company, Inc., a corporation organized under the laws of the District of Columbia, and acting here in pursuant to a Resolution of its Board of Directors, party of the first part; and Keane-Loffler, Inc., a body corporate duly incorporated under the laws of the State of Maryland, party of the second part.

WITNESSETH, that for and in consideration of the sum of Ten dollars, the said party of the first part does grant unto the said party of the second part, in fee simple, the following described land and premises, with the improvements, easements and appurtenances thereunto belonging, situate in the District of Columbia, namely: part of Lot numbered One (1) in a subdivision of part of a tract of land known as "Beall's Pleasure", as per plat attached to deed recorded in Liber 1610 at folio 245 of the Land Records of the District of Columbia, and being now known for the purposes of assessment and taxation as part of Parcel 176/44, and being described as follows: beginning for the same at a point in the Northerly line of Benning Road; distant Southeast, 182.64 feet from the intersection of the Northerly line of Benning Road, 110 feet wide, with the Southeasterly line of the Right of Way of the Alexandria Branch of the Baltimore and Ohio Railroad, and running thence South 79 degrees 01 minutes East, 74.57 feet; thence North 39 degrees 56 minutes East, 126.12 feet; thence North 50 degrees 4 minutes West 65.25 feet; thence South 39 degrees 56 minutes West, 162.21 feet to the Northerly line of Benning Road and the point of beginning, containing 9406.77 square feet as shown on plat of computation recorded in the Office of the Surveyor for the District of Columbia in Survey Book 82 at page 194.

Also part of a tract of land called "Fortune Enlarged", and part of Lot numbered Five (5) in the division of the Estate of Joshua Beall among his heirs, being a part of "Fife and Fife Enlarged", and being a part of the land conveyed to the Union Stock Yard Company by Deed recorded in Liber 1280 at folio 452 of the Land Records of the District of Columbia, and being now known for the purposes of assessment and taxation as part of Parcel 168/9, and being described as follows: beginning for the same at a corner formed by the North face of the wall on the South side of a branch at a fence on the Westerly side of the main alley on the grounds formerly owned by the Union Stock Yards Company, said point being also the Northeastly corner of the land conveyed to the Washington Abattoir Company by Deed recorded in Liber 3869 at folio 275 of the said Land Records, and running thence North 37 degrees 42 minutes West along said wall, 109.98 feet; thence North 43 degrees 54 minutes East, 15.51 feet; thence South 38 degrees 36 minutes East, 31.11 feet; thence South 76 degrees 43 minutes East 13.57 feet; thence South 37 degrees 42 minutes East 65 feet; thence South 39 degrees 21 minutes West 25 feet to the place of beginning, containing 2331 square feet as shown on plat of survey recorded in the Office of the Surveyor for the District of Columbia in Survey Book 94 at page 497.

To have and to hold the same unto and to the use of the said party hereto of the second part, in fee simple.

And the said party of the first part hereby covenants to warrant specially the property hereby conveyed, and to execute such further assurances of said land as may be requisite.

IN TESTIMONY WHEREOF, on the day and year first hereinbefore written, the said party of the first part, has caused these presents to be signed in its corporate name by Andrew D. Loffler, its President, attested by Arthur S. Cudmore its Secretary and its corporate seal to be hereunto

affixed, and does hereby constitute and appoint Andrew D. Loffler, its true and lawful Attorney in fact for it and in its name to acknowledge and deliver these presents as its act and deed.

[CORPORATE SEAL]

A. LOFFLER PROVISION COMPANY, INC.,
By ANDREW D. LOFFLER, *President*.

Attest: ARTHUR S. CUDMORE, *Secretary*.

DISTRICT OF COLUMBIA, to wit:

I, Lloyd A. Douglass a Notary Public in and for the District of Columbia, do hereby certify that Andrew D. Loffler who is personally well known to me as the person named as Attorney in fact in the foregoing and annexed Deed, bearing date on the 6th day of July A. D. 1928, to acknowledge same, personally appeared before me in said District and as Attorney in fact as aforesaid, and by virtue of the authority vested in him by said Deed acknowledged the same to be the act and deed of A. Loffler Provision Company, Inc. the grantor therein and delivered the same as such.

Given under my hand and seal this 6th day of July A. D. 1928.

[NOTARIAL SEAL]

LLOYD A. DOUGLASS,
Notary Public, D. C.

THIS IS TO CERTIFY that the foregoing and annexed Deed was duly executed and delivered pursuant to and in strict conformity with the provisions of a resolution of the Board of Directors of A. Loffler Provision Company, Inc. passed at a regularly called meeting of said Board of Directors, and that a quorum was present at said meeting.

[CORPORATE SEAL]

ARTHUR S. CUDMORE,
Secretary.

Plaintiff's Exhibit No. 20

1728 Webster Street, N. W.
Washington, D. C.
October 24, 1942

SOLOMON GROSSBERG, Esquire
Peoples Life Insurance Building
Washington, D. C.

Re: F. S. Kogod

Dear Mr. Grossberg:

Please refer to your letter of the 12th instant, addressed to Mr. Andrew E. Nelson, formerly President and now trustee for the Adolph Gobel, Inc., wherein you requested to remove the wooden props anchored on a portion of the alley which protects the walls in place.

Allow me to inform you that I purchased that property from the District Court of New York on September 30 ultimo, and those props were then in place. Mr. Nelson informed me over the phone on the 21st current, that these props have been there for over twenty years. He also mailed me a set of drawings of the buildings, which drawings were made in March, 1937. These drawings show a road on the front of the main building and a road alongside of the said buildings. I do not know if these roads were dedicated to the District of Columbia but I do know that these roads have been used by the public from time immemorial, more so, naturally when Gobel was operating, as they had a retail store serving the public in conjunction with the abattoir.

I am writing these facts to you, so you may convey them to Mr. Kogod for his guidance in his grading operations, as my attorney informs me that in the event that these roads were not dedicated we still have a prescription right to use said roads.

However, if Mr. Kogod is willing to cooperate with me to have extended 35th Street, N. E., to Bennings Road, be-

tween his and my property, I am willing to tear-down the two story brick building and convey a portion of my land for said extension of 35th Street. This suggestion if adopted of course will be beneficial to both of us, also to the District and the public in general in which event I believe he can use all the surplus earth of the premises, while the excavator is there. On the contrary, of course you understand that I have no other alternate but to protect my rights in a legal manner.

I am sure you will convey the contents of this letter to your client, at the earliest possible moment and in the same friendly spirit in which it is written.

Very truly yours,

JC:TI

Plaintiff's Exhibit No. 21

SOLOMON GROSSBERG
Attorney at Law
Peoples Life Insurance Building
Washington, D. C.
National 8840
October 26, 1942

MR. J. COGITO
1728 Webster St., N. W.
Washington, D. C.

Dear Mr. Cogito:

This is to acknowledge receipt of your letter of October 24, 1942, in reference to the matter of a disputed right of way between the property recently purchased by you from Adolf Gobel, Inc. and the property belonging to my client, Fred S. Kogod.

I regret that Mr. Kogod is temporarily out of the City and therefore I am unable to advise you as his reaction to your proposal for joint dedication of an extension to 35th Street. Upon his return I shall be pleased to discuss the matter with him and inform you further.

However, for the purposes of the record, I desire to reply to your contention regarding the prescriptive or other right to the use of an alleged roadway between the respective properties. I believe that I can state with certainty that there never has been any dedication of such a roadway to the public use. Therefore, if that be true, the only other way in which you or the public could have acquired a right to the use of such a roadway would be through continued, adverse and uninterrupted use of the roadway for the necessary period provided by law.

If such roadway as you claim existed for many years can actually be borne out by proof, nevertheless there can be no question that the same has not been used for a great many years preceding your recent purchase of the property. I am certain that your attorney will advise you that in view of the lack of continued use of the alleged roadway, any prescriptive right which may have existed, has long since been lost.

When my client acquired ownership of the property he obtained a policy of title insurance from the District Title Insurance Company, and that policy fails to record any rights of way over any part of the property. If you or your attorney so desire, I shall be pleased to go into the matter fully so that a final decision may be reached between us.

Very truly yours,

SOLOMON GROSSBERG.

SG:d

Plaintiff's Exhibit No. 22
1728 Webster Street, N. W.
Washington 11, D. C.
May 18, 1945

FRED S. KOGOD, Esquire
1711 - 14th Street, N. W.
Washington, D. C.

Dear Mr. Kogod:

First of all, permit me to thank you and your wife, as well as your attorney for the granting an easement, to the Washington Gas Light Company on my behalf, which I trust that I may be able some day, to return the favor to all of you.

Secondly, I trust that you will accept my apology, for not having been able to give you my answer any sooner, to the conversation that you and I had on December 28th, ultimo, pertaining to the purchase of that piece of land adjoining my property on Bennings Road, N. E., due to my absence from the City.

Pursuant to that conversation, of the above date, I employed, as I promised you, an appraiser who has a good reputation and experience in the District of Columbia. I instructed him to value only the vacant land to disregard the easements and other rights of way, or other obstructions, that may be on the premises. I told him also, that he should disregard the assessed value or other appraisals that he may know of, but that should however take into consideration the possibility of further development of that particular area that you and I talked about.

He stated, that the value of property is depended largely upon the use to which it can be put, both present and future, also, what a business will pay for a similar location. I then requested him, to give me his detailed report and how he arrived at a price. He stated "Due to the long frontage, on Minnesota Avenue, he valued the entire parcel at \$42,500.00, and sub-divided as follows:

The first 125 feet depth, facing Minnesota Avenue, he valued at Twenty-six cents (\$.26) per square foot.

The next 125 foot depth, or 250 feet west of Minnesota Avenue, he valued at Nineteen and half cents (\$.195) per square foot.

The next 125 feet depth, or 375 feet west of Minnesota Avenue, he valued at Thirteen cents (\$.13) per square foot.

The last 125 feet depth, or 500 feet west of Minnesota Avenue, he valued at Six and half cents (\$.065) per square foot.

While today prices are very much inflated, as you know, nevertheless, I am willing to pay you the appraisers value for that portion of land you indicated to me, that you are willing to sell, which portion he estimated to contain about 14,000 square feet of land.

Therefore, I hereby offer to pay you Six and half cents, (\$.065) per square foot for the conveyance of said area, which amount I agree to pay upon delivery of a clear title in my name of said area of whatever amount of area you want to dispose of, of course adjoining my parcel 168/50.

Of course you will understand, that this offer is subject to your approval on or before July 1st, current year, and, shall become null and void, as never been made, after that date.

In the event that you wish to accept it, I shall be glad to employ the District Surveyors to survey it, and make plans of the area that you don't need.

Very truly yours,

JC:TI

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,052

April Term, 1951

FRED S. KOGOD AND CELIA KOGOD, *Appellants*,

v.

JOSEPH COGITO, *Appellee*.

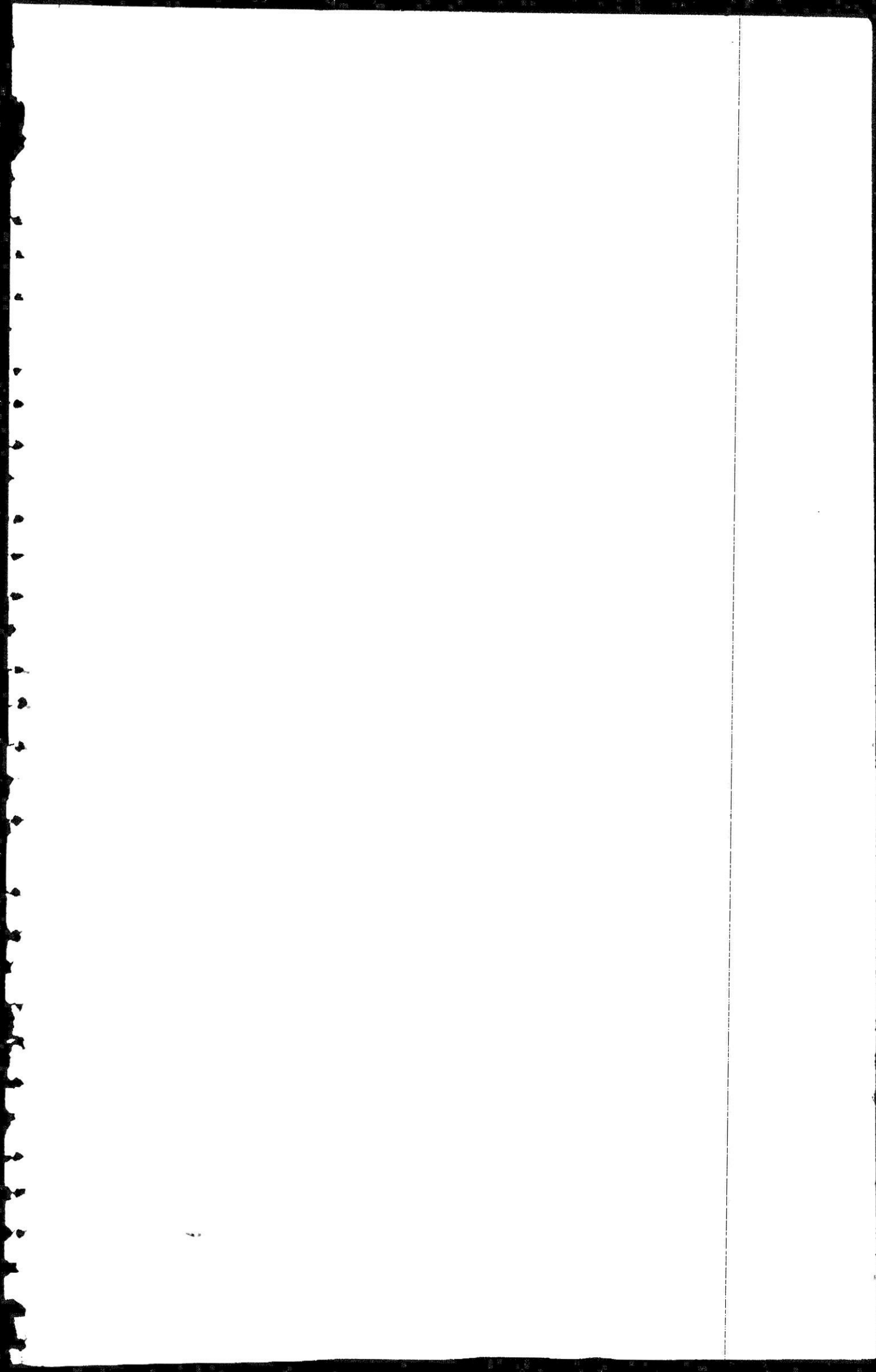
Order

On consideration of the appellee's motion for leave to file six copies of certain exhibits in lieu of printing the same in the joint appendix and for leave to exhibit all exhibits to the Court at argument, it is

ORDERED by the Court that the motion be granted, and that the appellee be, and he is hereby, allowed to file six copies of the exhibits described in appellee's motion.

Dated: August 13, 1951.

PER CURIAM.



BRIEF FOR APPELLANTS

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,052

FRED S. KOGOD, CELIA KOGOD, *Appellants,*

v.

JOSEPH COGITO, *Appellee.*

Appeal from the United States District Court for the
District of Columbia.

United States Court of Appeals

For the
District of Columbia Circuit

FILED NOV 5 1951

Joseph H. Stewart
CLERK

LOUIS M. DENIT,
THOMAS S. JACKSON,
P. BAXTER DAVIS,
MARTIN R. FAIN,
719 15th St., N.W.,
Washington 5, D. C.,
Counsel for Appellants.

IRVING B. YOCHELSON,
BRANDENBURG & BRANDENBURG,
Of Counsel.

QUESTIONS PRESENTED.

1. In the absence of an express grant or necessary implication from words used in a conveyance, may one acquire an easement for general passage over the lands of another merely by showing long continued use?

2. If, by long continued use, a right of way has been established for farmers and others dealing with a specialized business, such as an abattoir, does the discontinuance of that business work a dissolution of the right of way to and from the land where such business was conducted?

3. If a right of way has been established for a particular purpose, to what extent, if at all, may it be enlarged to suit the desires or whims of the dominant tenement?

4. Is one buying land charged with notice of an easement which is neither apparent on reasonable observation nor a matter of record?

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11052

FRED S. KOGOD, CELIA KOGOD, *Appellants*,

v.

JOSEPH COGITO, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the District of Columbia, enjoining the obstruction of certain alleged rights of way over land owned by appellants.

Jurisdiction of this Court is conferred by Sec. 17-101, D. C. Code 1940; Secs. 1291 and 1294, Title 28, U. S. C. A.

STATEMENT OF THE CASE.

For convenience, the parties will be referred to as they appeared in the court below.

The Pleadings and Issues.

On February 15, 1949, plaintiff brought this action for an injunction to compel the defendants to remove an obstruction to an alleged right-of-way on the east side of his property, in which he claimed an easement "by deed and by prescription and of which the defendants have both actual and constructive notice". (J. App. 2-14) He also claimed, apparently in the same manner, an easement in a so-called alley on the north of his property. (J. App. 9) He alleged, in substance, that he and the defendants derived title from a common source (J. App. 4); that by deed dated February 4, 1943, he acquired two tracts of land which the Union Stockyard Company (common source of title) had conveyed (1) to Washington Abattoir Company in 1894 (J. App. 5), and (2) to Keane and Auth in 1906 (J. App. 6), said tracts being now known for purposes of assessment and taxation as Parcel 168/50; that other property owned by the Stockyard Company had been conveyed by it to Eastern Development Corporation in 1941, and by the latter to the defendants in 1942 (J. App. 7); that there had existed and been in use as an easement for his property adjacent to and along the southeasterly side thereof a paved alley approximately 25 feet wide extending from Benning Road southwesterly about 500 feet (J. App. 8, 9); that there was an auxiliary alley adjacent to and along the northeasterly side of his property about 35 feet wide, which extended in a northwesterly direction approximately 117 feet from the intersection of the other alley, referred to as main alley, and in which he likewise claimed an easement. (J. App. 9) Although both of these so-called alleys were within the boundaries of the land conveyed to the defendants, plaintiff alleged that he and his predecessors in title

had used them for ingress and egress to the property now owned by him, and that such use had been uninterrupted, notorious, hostile and adverse to any one who attempted to close the same; that defendants barricaded the main alley so as to prevent trucks and other vehicles from using it as an entrance to his property, which had been improved by commercial buildings, causing him loss and damage. (J. App. 9, 10) Accordingly, he demanded a mandatory injunction for removal of the barrier, and that the defendants be required to keep the alleys open. (J. App. 14)

Pursuant to a stipulation between the parties, defendants removed the barricade, it being agreed that the status quo existing prior to this action would be maintained, *without prejudice*. (J. App. 17)

In their answer, defendants denied that they ever obstructed any easement or right-of-way belonging to the plaintiff. (J. App. 18) They further denied that he was entitled to an easement by deed, prescription, or otherwise, and asserted that if any easement existed it had been abandoned and relinquished by non-user, relinquishment and surrender more than twenty years prior to the filing of this action and the date when plaintiff acquired title. (J. App. 19) Defendants alleged that on several occasions plaintiff promised them he would not use, or permit his trucks to use any portion of the land owned by them, including the alleged rights-of-way; that notwithstanding his agreement, and in violation thereof, plaintiff used and permitted his trucks to use their land, and as a result they were compelled to erect a barricade for its protection and preservation.

Accordingly, the main issues raised by the pleadings were (1) had there ever been created, either by deed or prescription, an easement over defendants' land which was appurtenant to the land of the plaintiff; (2) if such an easement ever existed, had it been lost prior to the time plaintiff acquired title?

Summary of the Evidence.

There was no dispute that the land owned by each of the parties was once the property of the Union Stockyard Company, which acquired it by a conveyance in 1887. (J. App. 269-272). Plaintiff conceded that the fee simple title to all of the property over which he claimed an easement was vested in the defendants. (J. App. 7, 25, 59).

Evidence adduced by the plaintiff was to the effect that the so-called main alley had been shown on sundry maps and surveys since 1906, (J. App. 178), and that it had been used as a means of access to the Washington Abattoir by farmers and others bringing in livestock to be slaughtered. (J. App. 120; 122; 153; 160) It was also used by the letter carrier to deliver mail to employees at the Abattoir (J. App. 112-114); and for the removal of machinery and junk when the Abattoir ceased operations in 1933. (J. App. 122) After 1933, it was used only by the Stockyard people. (J. App. 161) The auxiliary alley was used to unload animals from trains and route them to stock pens, and also to do a little loading of manufactured goods at the sausage plant located on the north end of what is now plaintiff's property. (J. App. 154)

There was no evidence of a formal dedication of either the main or auxiliary alleys. There was likewise no evidence of an express grant of an easement in respect thereof, either to the plaintiff or any of his predecessors in title.

Defendants offered evidence to the effect that from about 1906 the operations of the stockyard and abattoir were approximately as follows: Live animals which came in by truck or wagon were hauled through the main alley from Benning Road and either placed in pens or taken to the abattoir. This alley was fenced and closed by gates. The gates on both ends were locked at the close of the day and kept locked until the stockyards opened in the morning. (J. App. 238; 241; 245; 247) There were also gates in the so-called auxiliary alley used for controlling the passage of cattle brought in from the railroad. (J. App. 239, 240)

In addition to the gate at Benning Road, there was a gate in the main alley at the extreme end thereof which was kept locked. (J. App. 240)

This evidence as to the control exercised by defendants' predecessors in title over both the main and auxiliary alleys was not controverted. Indeed, a witness testifying for plaintiff said that the main alley was kept clean by employees of the Stockyard Company. (J. App. 162)

When defendants acquired title, the buildings on the land subsequently bought by the plaintiff were dilapidated and were not being used. (J. App. 184) The land had been lying there like a ghost town for a number of years. (J. App. 223) On the east side it was separated from the Stockyard property by a fence, which enclosed the so-called main alley from Benning Road to a point beyond the Abattoir. (J. App. 222, 223) This alley was not being used, and was grown up in grass and weeds.

At the conclusion of the evidence, before any argument of counsel, (J. App. 256), and without having read the pleadings, (J. App. 261), the Court indicated his conclusions (1) that defendants did not have title either to the main alley or auxiliary alley (J. App. 256); (2) that anybody who owned property there (meaning the area formerly used by the abattoir) could use these alleys for general passage (J. App. 260); (3) that while the alleys were fenced and gates thereon locked, that was merely as a matter of convenience (J. App. 262); and (4) that both the main and auxiliary passageways were public alleys "dedicated by long usage". (J. App. 267). Accordingly, he announced that he would grant an injunction both as to the main alley and the auxiliary alley. (J. App. 268)

Notwithstanding the views thus expressed, the Court then proceeded to make findings of fact and conclusions of law, the general purport of which was that the plaintiff had acquired by prescription a right of way for general purposes of passage for ingress and egress over both the main alley and auxiliary alley lying within the boundaries of the land owned by the defendants, and that the defendants should

be permanently enjoined from preventing use thereof. (J. App. 26-33). Such prescriptive right, the Court found, had been acquired by uninterrupted, continuous, open, notorious, hostile and adverse use for general purposes of ingress and egress since prior to 1906, (J. App. 26, 27, 30), and was not by permission. (J. App. 31) Although the abattoir had not been used since 1933, according to the undisputed evidence, and the alleys were used exclusively by persons having business with the abattoir or the stockyards, the Court found that the right to such use had not been abandoned or lost. (J. App. 31-32)

Judgment awarding an injunction was entered, (J. App. 33-36), and from such judgment this appeal has been prosecuted.

STATEMENT OF POINTS ON APPEAL.

1. The Court erred in finding that rights-of-way on the easterly and northerly sides of the property owned by the plaintiff have been used by said plaintiff and his predecessors in title for general purposes of passage for ingress and egress, and that such use has been uninterrupted, continuous, open, notorious, hostile and adverse since prior to 1906.

2. The Court erred in failing to find and hold that defendants are the owners of the fee simple title in and to the land adjoining the property of the plaintiff on the easterly and northerly sides thereof, and that the same is not subject to any easement.

3. The Court erred in finding that an easement (right-of-way), exists and is now in use, and has been in existence and continuous use since prior to 1906, in a passageway extending from Bennings Road southerly approximately 503 feet by a width of 25 feet, adjacent to and along the easterly side of the property owned by the plaintiff.

4. The Court erred in finding and holding that said passageway has been used for general purposes of ingress and

egress by the plaintiff and his predecessors in title, and by other abutting property owners adjacent thereto, and by any one having business in the rear property abutting thereon, and the public, in connection with the business activities conducted upon the properties abutting and adjacent to the same.

5. The Court erred in failing to find and hold that defendants and their predecessors in title exercised exclusive control and dominion over said so-called passageway and any use made thereof by plaintiff's predecessors in title was permissive and not hostile or adverse.

6. The Court erred in finding and holding that a right-of-way exists and is now in use, and has been in existence and continuously used since prior to 1906, in another passageway extending from the westerly side of the so-called main alley, in a westerly direction 117 feet adjacent to and along the northerly side of plaintiff's property, which has a width of 30 feet at the easterly end and 40 feet at the westerly end thereof.

7. The Court erred in finding and holding that said passageway has been used for general purposes of ingress and egress by plaintiff and his predecessors in title to the property since 1906.

8. The Court erred in failing to find and hold that any use made of said last mentioned passageway was by permission of defendants and their predecessors in title, and was not hostile or adverse.

9. The Court erred in finding and holding that said so-called passageways on the easterly and northerly sides of plaintiff's property were designated and identified as alleys.

10. The Court erred in failing to find and hold that, at the time defendants acquired title, any use of the so-called passageways on the easterly and northerly sides of said

plaintiff's property had been discontinued, and any claim of right to use the same had been abandoned.

11. The Court erred in failing to find and hold that at the time defendants acquired title the so-called passageways were fenced and enclosed within the lines of defendants' property as ascertained and set forth in an official survey thereof.

12. The Court erred in finding and holding that the plaintiff had any right-of-way or easement over any part of defendants' land.

13. The Court erred in failing to find and hold that defendants and their predecessors in title closed and controlled use of the so-called passageways or alleys under claim of right.

14. The Court erred in finding and holding that defendants had actual and constructive notice of the existence of rights-of-way on the easterly and northerly sides of plaintiff's property, which rights-of-way constituted easements appurtenant to said plaintiff's property.

15. The Court erred in holding that the so-called passageways were public alleys, and that defendants had no title thereto.

16. The Court erred in granting an injunction.

SUMMARY OF ARGUMENT.

While the errors assigned are numerous, we believe they present the following principal questions, namely:

1. Did the plaintiff establish, either by deed or prescription, an easement over defendants' land with respect to either the main alley or the auxiliary alley? Upon this question, it is our position (a) that there was no express grant and (b) that the evidence relied upon to establish a prescriptive right was wholly insufficient.

2. If, by reason of long usage, a right of way had been established for farmers and others having business with the abattoir to use these alleyways for access thereto, did the discontinuance of the abattoir work a dissolution of such right? We contend that no right of way was ever established as a matter of law, and that any use was purely permissive. On the other hand, if by any construction the right arose, it ceased when the reason for its exercise terminated.

3. If there was a right of way, however created, for access for customers of the abattoir, either to drive in their cattle for slaughtering or to haul away fertilizer, can the plaintiff enlarge upon that use so that persons dealing with him in the conduct of one or more commercial enterprises not related to an abattoir may travel the alleys by truck or otherwise as suits their convenience? It is our position that a right of way for one purpose, and limited in scope, cannot be expanded to a general right of passage at the pleasure of the dominant tenement and at the expense of the servient tenement.

4. Under the circumstances of this case, were the defendants put on notice by anything appearing of record or which they could have observed prior to taking title that the property which they bought and paid for was subject to any outstanding easements? We contend that they had neither actual nor constructive notice, but on the contrary, were justified in believing from the physical conditions which they saw that there were no easements affecting their property, and, having parted with their money in good faith, they are entitled to the full enjoyment of their property.

ARGUMENT.

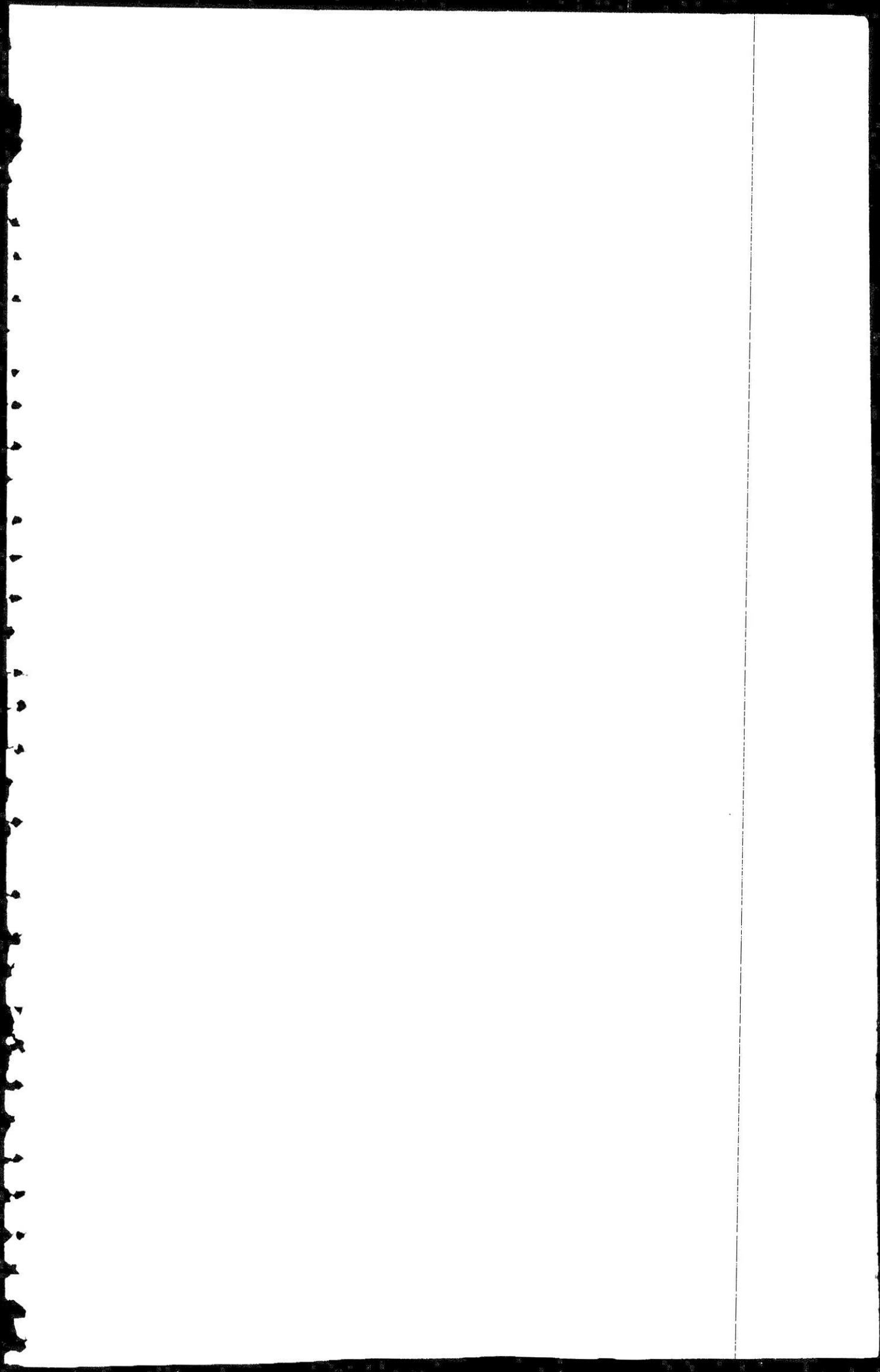
No Easement Established.

Opposite the following page we have inserted a diagram which visually presents the location of the land owned by each of the parties and the disputed areas over which plaintiff claimed a right-of-way, but which the trial court con-

cluded were public alleys. It is not and does not purport to be a survey, but is intended merely for use as a diagram.

All of this property was acquired by Union Stockyard Company in 1887. (J. App. 269-272). That Company operated a stockyard. In 1890 it leased a part of its land to Washington Abbatoir Company for a term of forty years (J. App. 279) The lessee was given a right-of-way for its officers, servants, cattle, horses and vehicles, and for its patrons, cattle, horses and vehicles, over a strip of land marked "Driveway" twenty-five feet wide at the intersection of the south side of Benning Road and the east line of the Baltimore & Ohio Railroad. (J. App. 80) This is the twenty-five foot right-of-way shown on the diagram connecting plaintiff's property with Benning Road. The lease further provided that the term granted was limited upon two conditions, namely, that the lessee would erect, maintain and operate a substantial building or buildings suited for an abbatoir or place for the slaughtering of meat cattle, sheep and hogs, and for the proper care of the carcasses thereof, (J. App. 281); that if it ceased to maintain and operate for the space of eighteen months at any one time, then its term should cease and determine "to all intents, purposes and constructions whatsoever." (J. App. 282) Four years later, the Stockyard Company conveyed said real estate to the Abbatoir Company, and expressly granted a right of way over the strip marked "Driveway" in the same language as had been employed in the lease (J. App. 289-291) This conveyance was made on condition that the grantee should surrender said lease, and the fact of surrender was recited therein. (J. App. 290)

In 1904, Washington Abattoir Company conveyed said property to Loffler, Keane and Auth, as Trustees, to hold for the A. Loffler Sausage and Provision Company, the T. T. Keane Company and the N. Auth Provision Company, corporations then engaged in the sale of meat products. In addition to its land, the Abattoir Company also transferred and conveyed all of its machinery, fix-



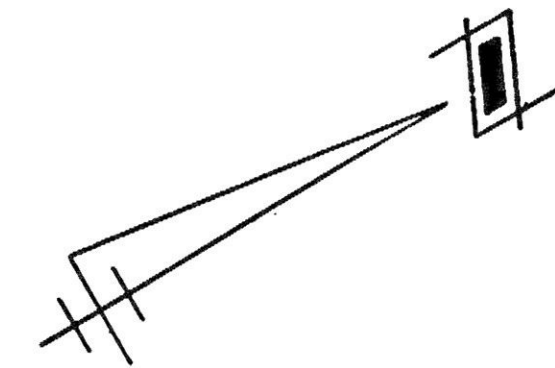
SYMBOLS:

\\\\\\\\\\\\ COGITO'S LAND.

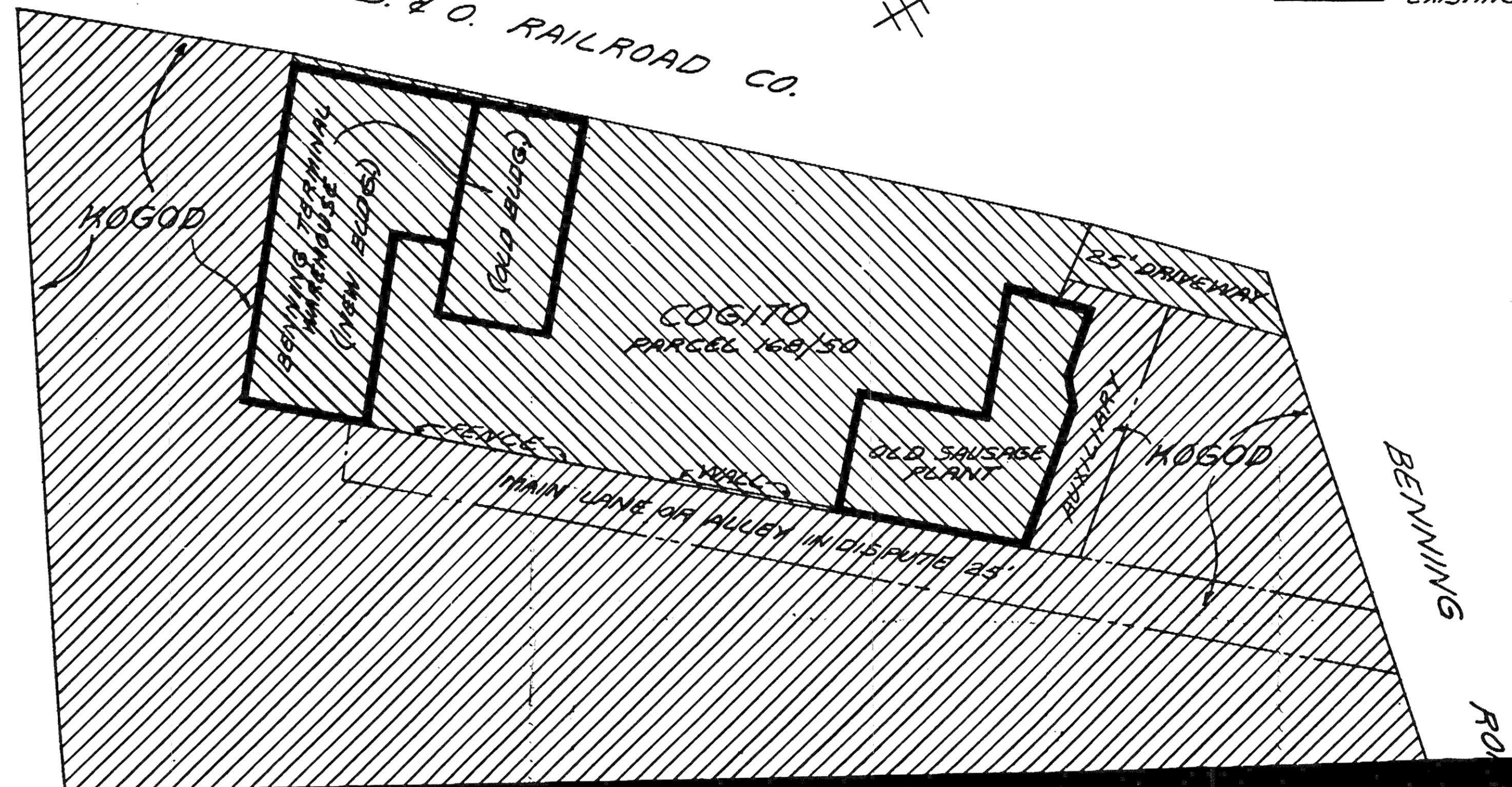
//// //// KOGOD'S LAND.

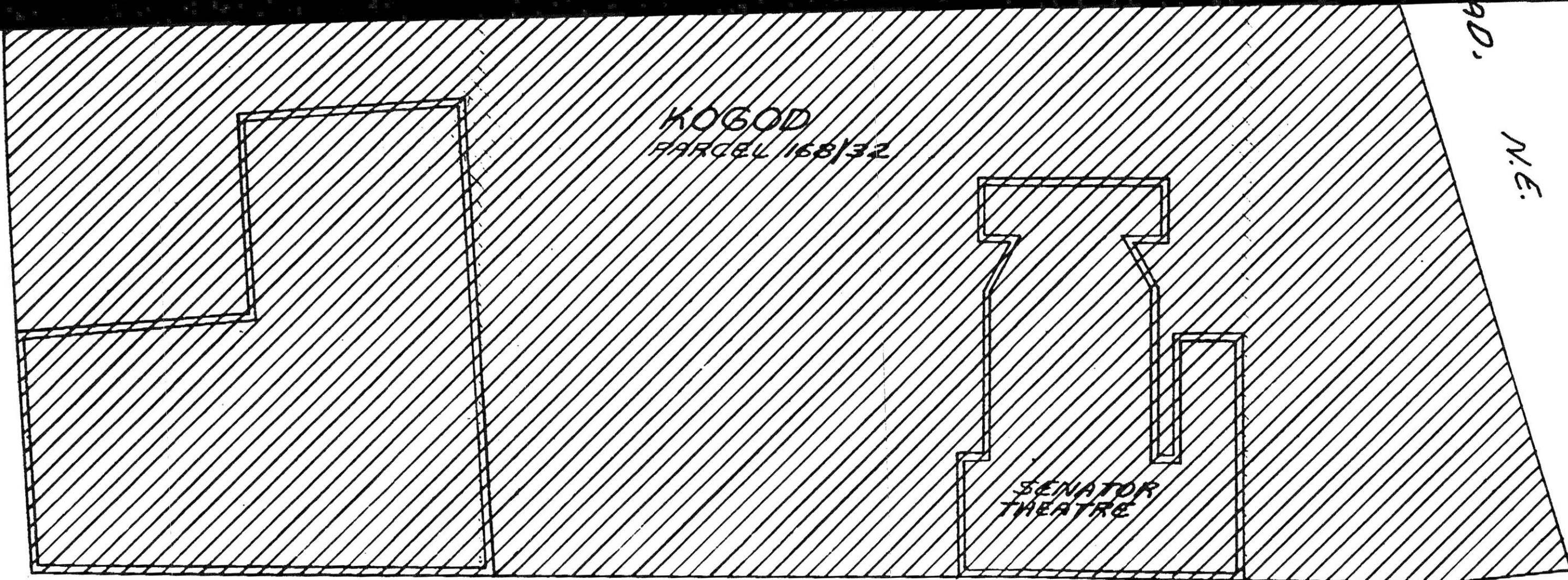
———— EXISTING BUILDINGS ON COGITO'S LAND.

===== EXISTING BUILDINGS ON KOGOD'S LAND.



B. & O. RAILROAD CO.





KOGOD
PARCEL 168/32

SENATOR
THEATRE

90.
N.E.

MINNESOTA AVENUE, N.E.

tures and paraphernalia of trade located thereon. (J. App. 299-307)

In 1906, the Stockyards Company conveyed to Keane and Auth, as Trustees for the A. Loeffler Sausage and Provision Company, the T. T. Keane Company and the N. Auth Provision Company, a tract of land lying approximately south of that which had been conveyed to the Abattoir Company, the east line being "*on the west side of the main alley in the property of the stockyards company.*" (J. App. 294) This conveyance carried with it "all the rights, privileges and appurtenances, easements and rights-of-way to the same belonging or in anywise appertaining, but not including the use of any alleys south of the north line of the property hereby conveyed." (J. App. 295) These words did not create any new rights, but referred to those already existing.

Sheets v. Sheldon, 69 U. S. (2 Wall.) 177, 16 Am. Jur. 603; 17 L. ed. 822, 826.

On February 4, 1943, the property previously conveyed to the Abattoir Company and to Keane and Auth was conveyed to the plaintiff by the Trustee in Bankruptcy of Adolf Gobel, Inc. (J. App. 273) As in the previous deeds, there was no reference made to an easement in the main or auxiliary alleys. The only right-of-way expressly granted was the 25 foot driveway at the northwesterly end of the property. After a metes and bounds description, plaintiff's deed contained the following language:

"And all of the right, title and interest in and to the same of said Adolf Gobel, Inc., together with any and all right, title and interest or estate which Adolf Gobel, Inc., debtor, or Charles Seligson as Trustee of Adolf Gobel, Inc., debtor, may have or could claim or assert in and to any of the land adjoining the above described property on the North, East or South * * *" (J. App. 276)

Here again, we submit that this additional language did not create any new rights. Hence, we maintain that there was

no basis for the claim that plaintiff ever acquired an easement by deed either in the main or auxiliary alley.

As we see it, there is likewise no basis for the contention that he obtained an easement by implication. At the north of his property he was given a right-of-way over the "Driveway." (J. App. 291) Of necessity, this excludes the implication of any other way. On the easterly line his property was described not as bounded on the main alley, but by a fence on the westerly side of the main alley. More apt language to exclude the alley could hardly have been used.

Lankin v. Terwilliger, 22 Ore. 97, 29 P. 268.

Moreover, an implied easement, if there were any, with respect to the southerly portion of his property, would be limited thereto. It could not be extended for the benefit of all of his land.

Penn Bowling Recreation Center, Inc. v. Hot Shoppes, Inc., 86 U. S. App. D. C. 58, 179 F. (2) 64.

No Prescriptive Right Established.

The law is well settled that in order to establish a right-of-way by prescription, plaintiff must prove not only an open, uninterrupted, notorious and continuous use, but also that such use was adverse.

Umhau v. Bazzuro, 76 U. S. App. D. C. 394, 133 F. (2) 356.

2 Washburn on Real Property, 1253, 1254.

2 Thompson on Real Property (Perm. Ed.), 521, 513.

Therefore, the fact that both alleys were shown on old surveys and existed for many years, is not enough to establish a prescriptive right to use them. There must be evidence that such use was under a claim of right and was hostile to the true owner. The evidence in this case was uncontradicted, clear and unequivocal that at all times prior to 1933 the alleys in question were used by permis-

sion of the Stockyard Company. That company was interested in seeing to it that cattle were routed to the Abattoir. Pending their slaughter, it derived revenue from keeping and feeding them. Its interests were tied in with the Abattoir and Sausage Plant on the adjoining property. No formal permission appears to have been given to use the alleyways. On the other hand, the uncontradicted evidence showed that employees of the Stockyard Company controlled access over both the main and auxiliary alleys, locking the gates at night and keeping the keys. (J. App. 238; 241; 243-245) The gates were made of heavy material reinforced inside. (J. App. 238) At the main entrance, namely, the main alley, the gates were locked at the end of the day and kept locked until the Stockyard opened in the morning. (J. App. 238; 245; 247) On one occasion, the President of the Stockyard Company prevented one of the operators of the Abattoir from bringing a load of hay over the main alley. (J. App. 241, 242) The Stockyard Company kept the alleys clean. (J. App. 162) In short, the record is palpably clear that the Stockyard Company exercised exclusive control over all the alleys within its territory (and they were numerous), without any claim on the part of anybody that he had a right to interfere. At the time plaintiff acquired title the hinges of one of these gates were apparent on the wall of the old sausage plant. (J. App. 193)

In the face of such evidence, the findings of the trial judge (1) that plaintiff and his predecessors in title used these alleys under a claim of right which was (2) hostile and adverse, were utterly without foundation.

In *Umhau v. Bazzuro, supra*, this Court said:

“To effect an easement the user must be accompanied by an assertion of a right to do the same without regard to the wishes of the owner of the land. It must be adverse to the interests of the owner under such circumstances as to indicate that it was claimed as of right. * * * If ever any adverse user was prac-

ticed, the continuity thereof was broken with each such request. The proposition that permissive user can never ripen into a prescriptive title is elementary."

The existence of gates across the alleyways and the retention of keys by the Stockyard Company was sufficient proof that the use was permissive and not adverse.

F. C. Ayres Mercantile Company v. Union Pac. R. Co., 16 F. (2) 395, 399.

Luecken v. Wuest, 31 Ill. App. 506.

Bushey v. Santiff, 86 Hun. 384, 33 N. Y. Supp. 473.

Belser v. Moore, 73 Ark. 296, 84 S. W. 219.

In the *Luecken* case, *supra*, the Court said, p. 510:

"It is, however, insisted that over this strip of land in controversy there was a public highway. The evidence shows that for access to his fields and for convenience of his neighbors, this strip of land was used as a highway, but while so used, for many years the appellee kept a gate across the road which was locked and persons desiring to pass through would get the key and unlock the gate."

In the case at Bar, the exercise of control was rigid. The gates at the main entrance were locked in the afternoon and kept locked all night and not opened until the next morning. The key was not entrusted to employees of either the Abattoir or the Sausage Plant. It was retained by employees of the Stockyard Company, who alone had access to it.

After the Abattoir ceased operating, only the Stockyard Company used the main alley as it kept on buying a little stuff apparently under the impression that the Abattoir would be rebuilt. When the fact that it would not resume was established, the Stockyard discontinued operation (J. App. 161), and use of the main alley ceased. Accordingly, we submit there was nothing upon which to predicate the finding as to hostility of use, and the conclusion based thereon was erroneous.

Effect of Discontinuance of Abattoir.

Defendants contend that even if, by reason of long usage, a right-of-way had been established for farmers and others having business with the Abattoir to use the alleys in question, for access thereto, the discontinuance of the Abattoir worked a dissolution of such right. The evidence showed beyond question that the use was permissive. Not a single person was produced to testify, and there was no written evidence offered, as to a claim of right to use. But, be that as it may, if there should be evolved from this record anything in the nature of a claim of right, it was limited to access for the purpose of transacting business with the Abattoir. The Abattoir ceased operations in 1933. Subsequent to that date, nobody claimed a right of passage over either of the alleys for the transaction of business with the Abattoir. When the Abattoir closed any vestige of right theretofore existing was dissolved. There was no longer any reason for its exercise.

But, the very fact that the right to use the alley, if it existed at all as an adverse right, was limited to a particular purpose, brought about its extinguishment when the business, for the purpose of which the right existed, ceased and was abandoned.

3 Tiffany, Law of Real Property, 3rd ed., Sec. 817 (p. 369):

“It has been said that when an easement is created for a particular purpose, it comes to an end upon a cessation of that purpose. * * * In the case on an easement created by prescription, * * * the question as to what is the particular purpose to be subserved by the easement is presumably to be determined with reference to the particular purpose of the user during the prescriptive period.”

2 Thompson on Real Property, Sec. 689 (pp. 364-5):

“An easement granted or reserved for a particular purpose, or one arising by prescription by an exercise

of the right for such purpose, ceases when this purpose no longer exists.”

In *Cotting v. City of Boston*, 201 Mass. 97, 87 N. E. 205, where by express grant a right had been given to pass through a store to another property, the court said (87 N. E. 207):

“Attaching due weight to the language used and the situation of the dominant and servient estates at the time the passage was created, it appears to have been the intent of the parties to continue the right of passage only so long as either of the buildings then in existence continue to stand, and not to create a perpetual easement attaching to the land of the dominant estate. It is of no consequence that the new building actually constructed upon the lot of the city is of the same dimensions as the older one. It is a different building, and the principle applicable to it must be the same, whatever its size.”

In *Hahn v. Baker Lodge*, 21 Ore. 30, 27 P. 166, a right of passage from a part of a lot for access to a building used for a lodge hall was deemed extinguished by destruction of the building, and could not be revived by construction of a new lodge hall. The court said:

“* * * if an easement for a particular purpose is granted, when that purpose no longer exists there is an end of the easement.”

In *Jones v. Van Bochove*, 103 Mich. 98, 61 N. W. 342, a cement company acquired by deed a right of way over land lying between its marl bed property and its factory. When the cement company went out of business it was held to be conclusive evidence of an abandonment of the easement.

To the same effect are *Day v. Walden*, 46 Mich. 575, 10 N. W. 26, where a right to take water is held to be lost when a mill, for which it was used, goes into decay, is destroyed and not rebuilt; *Roanoke Inv. Co. v. Kansas City, Etc., Ry. Co.*, 108 Mo. 50, 17 S. W. 1000, where a railway right of

way was held abandoned when the railroad ceased operation; *Weston v. Whittaker*, 102 Okla. 95, 226 P. 1034; *Griffin v. Dwyer*, 181 Okla. 71, 72, P. 2d 349, where a right to a way to reach a building used for an opera house was held lost when the building was allowed so to deteriorate from lack of repair as to be unfit for use as an opera house; *Central Wharf Etc. Corp. v. Proprietors of India Wharf*, 123 Mass. 567, where by action of the city a street closed access to a wharf, a use of a right of way to a place where the wharf had been was held to have been lost so the way could not be used for other purposes; *Bangs v. Potter*, 135 Mass. 245, where the court said:

“* * * when the railway was abandoned, all servitudes and easements terminated, and each owner had the right to use the whole of his lot for any purpose he pleased, without restraint by the ‘terms of sale’ or provisions in the deeds.”

So, in this case, when the Abattoir ceased operations, and the business was abandoned, any rights of way to the Abattoir property were extinguished forever.

No General Right of Passage.

Plaintiff claimed, and the trial court found, that the alleys had been used by the plaintiff and his predecessors in title for general purposes of passage for ingress and egress to their property. (J. App. 26) There was no evidence to support the claim or finding. Plaintiff's predecessors in title were engaged in the meat business, either in slaughtering animals, or processing them for human consumption. They, and the persons dealing with them, used the alleyways to bring in cattle for slaughter, or to haul away fertilizer. Occasionally, the auxiliary alley was used for loading at the Loffler plant. Whether this use was permissive or under claim of right and hostile to defendants' predecessors in title, the utmost that can be said is that it was limited in scope and confined to one general purpose.

It was not, as the court found, used generally for purposes of access, but was confined to bringing in live stock and taking away by-products. Plaintiff is a contractor and does not operate an Abattoir. At the time of trial he was renting his property to a millwork and lumber company (J. App. 86) and Benning Terminal Warehouse, which was housed in a building 150 feet long by 57 feet wide. (J. App. 74) His land is zoned heavy industrial, and a nine story building could be erected upon it. (J. App. 82) It was rented at one time by a storage company who used heavy trucks to come back and forth over the main alley, as well as the auxiliary alley. (J. App. 72, 73) It was also rented to a laundry business, which operated six trucks. (J. App. 73) In other words, instead of being used for the purposes originally intended, plaintiff will, unless the decision below is reversed, be permitted to make any use he desires of the alleys without regard to damage or injury to the same. He may, under the trial court's ruling, extend the use as he sees fit, although the genesis of it was limited in scope and purpose. This, we submit, is contrary to law.

2 Thompson on Real Property, Sec. 528 (p. 120):

“A right of way by prescription is limited to the common and ordinary use which was made of it during the period of prescription; and a prescriptive way acquired by a particular user can not justify a materially enlarged user which has not been enjoyed for the full prescriptive period.”

2 Washburn on Real Property, Sec. 1270 (pp. 310-311):

“If one who has an easement for one purpose, such as a footway, for instance, use it for another, as for carriages, it will not give a right to the owner of the servient estate to stop the use altogether, so as to deprive the former of his footway, for the rightful use in such case may be separated from that which is wrongful. But if the owner of the dominant estate extend his easement in another's land beyond what he has the right to enjoy, and does it in such a way that the owner

of the servient estate cannot stop the excessive use without stopping the use altogether, the latter may lawfully do so. * * * Thus, if the right of way be granted for the purpose of a way to a cottage, and the cottage is turned into a tanyard, the right of way would be lost. * * *

In *Bremer v. Manhattan Ry. Co.*, 191 N. Y. 333, 338, the Court said:

“The rule doubtless is that a right acquired by prescription is limited to the extent of the use and enjoyment of it during the period of prescription.”

See, also, *Penn Bowling Recreation Center v. Hot Shoppes, Inc.*, in this Court, *supra*.

Defendants Essentially Innocent Purchasers

In a very practical sense, defendants were innocent purchasers, without either actual or constructive notice of any alleged rights-of-way except the 25 foot driveway connecting plaintiff's property at its northwesterly end with Benning Road.

Mr. Kogod had known of the property since about 1919, and had visited it many times. (J. App. 187) He had used the driveway to reach the Keane and Loffler establishments from Benning Road. (J. App. 187) He had never used the so-called main alley, but knew that it was controlled and used for loading and unloading animals. (J. App. 188) He inspected the property in 1940 prior to making a contract to purchase it. (J. App. 182, 183) He also had a survey made and had the title examined. (J. App. 183, 184) When he examined the property in 1940, there was a surfaced piece of road of 25 feet, but no alley noticeable, although there were a lot of lanes criss-crossing the property where cattle sheds were located. (J. App. 184) Fences along the lanes were in fair shape, although some were knocked over and dilapidated to some extent. (J. App. 185) All of the lanes were similar, one was paved and some had cinders.

(J. App. 186) The property was vacant (J. App. 188), with the exception of a corner hotel that was still in operation. No other business activity was going on. (J. App. 188) At the main alley, there were two gates. The hinges on one of the gates were still in place. (J. App. 193) They were wooden gates on heavy iron shingles which were used to close this alley. (J. App. 194)

After acquiring the property, defendants made extensive improvements, consisting of a motion picture theatre and a large parking area in the rear (J. App. 197), a market occupied by Giant Food Stores, and other property. (J. App. 190, 191) In the latter part of 1946, upon returning from a vacation, Mr. Kogod found that plaintiff had erected an iron fence on the easterly side of his property with a gate opening on the main alley. (J. App. 190) He asked the plaintiff why this had been done, and the latter replied that it was a mistake; that he was sorry it had happened, and it would be kept locked. (J. App. 190) Plaintiff failed to keep the gate locked and some time later, defendants put a barricade in the form of a sign across the alley in order to protect their property. (J. App. 191)

Under these circumstances, we submit that there was nothing upon which to base the contention that defendants had actual or constructive notice of any easement other than the 25 foot driveway. Having parted with their money in reliance upon the survey, the title to which they caused to be examined, and in the honest belief that no other easements in fact existed, we submit they are essentially innocent purchasers for value and should be protected as such.

CONCLUSION.

Plaintiff failed to establish an easement by deed in respect of either the main or auxiliary alley. There was no evidence of user by him, or his predecessors in title, sufficient to create an easement by prescription. Any use of the alleys, under the circumstances disclosed by the evidence,

was insufficient to create a right because the use was permissive and not hostile or adverse.

~~Conceding~~ for the purpose of argument that there had been a use, ~~which extended~~ over a long period of time and reposed into a right, it was for a limited purpose only, that is, for persons having business with the Abattoir adjacent to defendants' property. When the Abattoir ceased operations any right of use was likewise terminated.

A right-of-way for driving and hauling cattle to an Abattoir if acquired by prescription can not be expanded into a right-of-way for general passage for any and every purpose, but is limited and restricted to the use originally made. That use having been abandoned, at least seven years before the defendants acquired title, without either actual or constructive notice, can not be relied on as a basis for either a right-of-way for general purposes of ingress or egress, or as a public alley.

We submit, therefore, that the findings and conclusions of the trial court, as well as the judgment based thereon, were erroneous and should be reversed.

Respectfully submitted,

LOUIS M. DENIT,
THOMAS S. JACKSON,
P. BAXTER DAVIS,
MARTIN R. FAIN,
Attorneys for Appellants.

IRVING B. YOCHELSON,
BRANDENBURG & BRANDENBURG,
Of Counsel.

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

—
No. 11,052
—

FRED S. KOGOD and CELIA KOGOD, *Appellants*,

v.

JOSEPH COGITO, *Appellee*.

—
Appeal from the United States District Court for the
District of Columbia
—

H. WINSHIP WHEATLEY,
H. WINSHIP WHEATLEY, JR.,
1010 Vermont Avenue, N.W.,
Washington 5, D. C.,
Attorneys for Appellee.

APPELLEE'S STATEMENT OF QUESTIONS PRESENTED

As the matter was heard below, the points presented are:

1. Defendants claim they have a fee title and plaintiff claims to have an easement over the fee title (J. App. 42).

2. Plaintiff is entitled to an easement over defendants' property by express grant, by implied grant, by prescription and by reasonable necessity, of which the defendants had actual and constructive notice.

3. Alleys described in recorded instruments, shown on official documents, used for general purposes, to adjoining properties, consistently and adversely, since 1906, are easements to the adjoining properties.

4. Plaintiff showed the uninterrupted, continuous, open, notorious, hostile and adverse use of rights of way to his property, for general purposes; the defendants claim that the use was restricted; the Court made a personal inspection at the site; the Court determined the issues and found the facts in favor of the plaintiff.

The appellants' brief apparently is based only on appellants' viewpoint of the evidence, overlooks plaintiff's evidence, notwithstanding the Court's express finding of the facts against them.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11052

FRED S. KOGOD and CELIA KOGOD, *Appellants*,

v.

JOSEPH COGITO, *Appellee*.

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEE

APPELLEE'S STATEMENT OF POINTS

For convenience, the parties are referred to in this brief as they appeared in the Court below.

The plaintiff differs from the defendants on the points presented.

Issues of fact were presented by the pleadings and evidence and decided by the Court in plaintiff's favor. The evidence was in conflict and the issue decided. Yet, the

defendants, in their brief, apparently adopt as fact their evidence, notwithstanding the Court's adverse finding with respect to the facts asserted by the defendants.

The Court made a personal inspection at the site; testimony of many witnesses on both sides was received, much of which referred to various exhibits by direct indication thereon to the trial judge; and, voluminous exhibits were offered.

As the matter was presented in the opening statements and heard by the Court below, the points presented are:

1. Defendants claim they have a fee title and plaintiff claims to have an easement over that fee title (J. App. 42).

2. Plaintiff is entitled to an easement over defendants' property by express grant, by implied grant, by prescription and by reasonable necessity, of which the defendants had actual and constructive notice.

3. Alleys, described in recorded instruments, shown on official documents, used for general purposes, to adjoining properties, consistently and adversely, since 1906 are easements to the adjoining properties.

4. Plaintiff showed the uninterrupted, continuous, open, notorious, hostile and adverse use of rights of way to his property, for general purposes; the defendants' evidence was that the use was restricted; the Court made a personal inspection at the site; the Court determined the issue and found the facts in favor of the plaintiff.

COUNTER STATEMENT OF CASE

As the appellants' summary seems to the appellee to be incomplete and the joint appendix includes 330 printed pages and there are numerous exhibits for which copies are furnished, the pleadings and evidence are summarized extensively for the convenience of the Court.

The Pleadings and Issues

The pleadings and issues are concisely stated in the Pretrial Proceedings, Statement of Nature of Case (J. App. 21-23).

On February 15, 1949, the plaintiff brought this action (J. App. 2-14) for an injunction to compel the defendants to remove an obstruction to, and keep open, an easement (right of way) by deed and by prescription of which the defendants had both actual and constructive notice (J. App. 2, ¶ 3), in alleys on the East and North sides (J. App. 8-9, 12, 13, ¶ 18 and 24) of his property (J. App. 2-4, ¶ 4 and 5). The complaint alleged plaintiff and defendants owned adjoining parcels of land (J. App. 2-4, ¶ 4, 5 and 6); both parcels were originally part of a tract owned by the Union Stock Yard Company, their common source of title through mesne conveyances, which, on February 26, 1890, was vested with title to all such properties (J. App. 4, ¶ 7); on February 4, 1943, plaintiff acquired from trustee in bankruptcy for Adolf Gobel, Inc., property now known for assessment purposes as Parcel 168/50, comprising three original parcels demised and conveyed separately by the Union Stock Yard Company in 1890 and subsequent years, together with any, and all rights, title and interest or estate of Gobel, Inc., in and to adjoining land on the North, East or South (J. App. 2-6, ¶ 4, 5, 8, 11, and 12); in 1890 Union Stock Yard Company leased part of one such parcel, now owned by plaintiff, to Washington Abattoir Co. of West Virginia, together with right of way through land which is now owned by defendants, and a plat of the demised land was recorded with the lease, on which the alley was shown (J. App. 4, 5 and 15, ¶ 8, 9 and 10 and Exhibit A, J. App. 287), and, in 1894, such demised Parcel and an additional adjoining part of such parcel, 53 feet southerly, now owned by plaintiff, was conveyed, in fee simple, by the Stock Yard Company to Washington Abattoir Co. (J. App. 5-6, ¶ 11) together with the easement; in 1906 Union Stock Yard Company conveyed to Keane and Auth another

parcel, now owned by plaintiff, adjoining and South of the property conveyed in 1894 and on the West side of the main alley, such alley being referred to therein, together with easements appurtenant thereto but not including the use of any alley south of the north line of the property conveyed (J. App. 6-7, ¶ 12 and 13); defendants in 1942 acquired the adjoining property to the North, East and South of plaintiff's property (J. App. 4 and 7, ¶ 6 and 17) by deed from Eastern Development Company, which had acquired same from the Stock Yard Company in 1941 (J. App. 7-8, ¶16-17); that an easement (right of way) exists for plaintiff's property through defendants' property in a main alley, adjacent to and along the East side of plaintiff's property, and in an auxiliary alley, adjacent to and along the North side of plaintiff's property (J. App. 8-9 ¶ 18), by reason of the recorded conveyances mentioned, as well as an implied grant, and, in addition, said easement had been available to and used for plaintiff's property for more than 20 years and such alleys are shown on plats, photographs and documents for more than 20 years and such use has been uninterrupted, continuous, notorious, hostile and adverse, and such easement was not abandoned (J. App. 9-11, ¶ 19 and 21); defendants were charged with constructive and actual notice of the easement (J. App. 10, ¶ 20); defendants at various times had threatened to obstruct the alleys and excavate in them, but plaintiff protested and defendants abandoned their threatened action, until February 4, 1949 when defendants erected a barricade, consisting of a number of posts and a sign across the main alley, blocking use of the alley as an entrance to plaintiff's property (J. App. 10-11, ¶ 21-22); the property owned by plaintiff has always been and is now used for commercial purposes and the continued use of the easement in such alley is essential to use of plaintiff's property on which there are large buildings used for commercial purposes (J. App. 11-12, ¶ 23). Accordingly, the plaintiff demanded a mandatory injunction for removal of the bar-

rier erected over the alley and that the defendants be required to keep open the easement in the alleys and for general relief (J. App. 13-14).

A motion for an injunction pendente lite requiring the defendants to remove the barrier over the alley and requiring the defendants to maintain the status quo ante of the easement in the alley was filed with the complaint. A stipulation between the parties for removal of the barricade and maintenance of the status quo was filed March 7, 1949 (J. App. 17). The defendants removed the barricade and the status quo prior to February 4, 1949, with reference to the easement, has since been maintained.

In their answer (J. App. 18-21), defendants admit ownership by plaintiff and defendants of the adjoining parcels of land involved (J. App. 18), the common source of title was Union Stock Yard Company (J. App. 18), and the conveyances to the plaintiff and defendants (J. App. 18 and 19); admit the recording of (1) the 1890 lease and plat attached, (2) the 1894 deed and (3) the 1906 deed (J. App. 18-19); defendants admit they erected a barricade across the alleged easement or right of way, although they deny that they obstructed any easement or right of way belonging to the plaintiff (J. App. 20); deny that the plaintiff was entitled to an easement through defendants' property by deed, prescription or otherwise (J. App. 18); deny defendants had actual or constructive notice of plaintiff's easement (J. App. 20); and assert that if any easement ever existed it had been abandoned more than twenty years prior to filing of this action and no use was made of the buildings occupied by plaintiff, or the alleged alley, for more than twenty years prior to filing of this action (J. App. 19-20); admit that plaintiff's property is commercial property but alleged the easement was not necessary for plaintiff's full use and enjoyment of his property (J. App. 20); defendants claim that on several occasions plaintiff promised them he would not use, or permit his trucks to use, any portion of the land owned by them, including the

alleged rights of way and, notwithstanding, plaintiff used and permitted his trucks to use defendants' land and as a result they erected a barricade for the protection and preservation of their property (J. App. 20).

The main points in issue raised by the pleadings were:

1. The plaintiff's claim to an easement over defendants' claim of a fee title.

2. The right to an easement for plaintiff's property over defendants' property by express grant, by implied grant, by prescription and by reasonable necessity, of which the defendants had actual and constructive notice.

3. Alleys, described in recorded documents, shown on official documents, used for general purposes, to adjoining properties, consistently and adversely, since 1906, are easements to the adjoining properties.

4. The right to an easement for plaintiff's property was not abandoned by plaintiff or his predecessors in title.

Summary of the Evidence

The plaintiff differs from the Appellants' summary of the evidence. Appellants overlook and gloss over the importance of evidence adduced by plaintiff and primarily accentuate evidence offered by defendants.

The allegations of the complaint were amply proved, the contentions of the defendants controverted, and the findings and conclusions of the Court completely supported by the evidence adduced in the case.

The evidence before the Court included numerous recorded instruments; official documents, plats and photographs; old photographs; court proceedings; the testimony of many witnesses and stipulations. In their testimony, many of the witnesses identified objects and locations by indication to the trial judge on exhibits in evidence.

The evidence showed that the Union Stock Yard Company by conveyance in 1887 (J. App. 47, 269, Exhibit 1)

acquired title to the land now owned by the parties and was vested with fee simple title to such land on February 26, 1890 (J. App. 25, 46); on February 26, 1890, Union Stock Yard Company leased part of the property now owned by the plaintiff to Washington Abattoir Company of West Virginia and a plat of the demised land was recorded with the lease, on which the alley in controversy was shown (J. App. 48, 279-287, Exhibit 4), a free-hand drawing of such plat with enlarged figures for reading was filed with the complaint (J. App. 15, 48, Exhibit A); in 1894 such demised parcel and an additional 53 feet southerly, now owned by plaintiff, was conveyed by Union Stock Yard Company to Washington Abattoir Company of West Virginia and its successors forever with easements, rights of way and appurtenance thereto belonging (J. App. 49, 289-293, Exhibit 5), the deed containing a description of the property as bounded by the alley in controversy; in 1904 Washington Abattoir Company conveyed to Loffler, Keane and Auth the parcel conveyed to it in 1894 (J. App. 50, 299-307, Exhibit 7,) the deed containing a description of the property as bounded by the alley; in 1906 another parcel now owned by plaintiff, adjoining and south of the property conveyed in 1894 and on the west side of the main alley, was conveyed by Union Stock Yard Company to Keane and Auth (J. App. 49, 294-298, Exhibit 6), the deed describing the eastern line of the property conveyed "on the west line of said alley" (J. App. 295) together with all the rights, privileges and appurtenances, easements, and rights of way to the same belonging or in anywise appertaining but not including the use of any alleys south of the north line of the property conveyed; in 1910 Union Stock Yard Company executed a mortgage to the American Security & Trust Company (J. App. 50-51, 307-313 Exhibit 8), for property now owned by defendants, adjoining property now owned by plaintiff, in which mortgage the property is described by course to the line of the alley and with said alley; in 1916 Loffler and Keane conveyed to Washington

Abattoir Company of the District of Columbia the property conveyed by the 1904 and 1906 deeds (J. App. 51, 313-317, Exhibit 9), describing said alley in such conveyance; in June 1928 Union Stock Yard Company conveyed to A. Loffler Provision Company an irregular parcel, now a northern parcel of plaintiff's property, adjoining and immediately north of the property described in the 1890 lease (J. App. 51, 317-321, Exhibit 10), describing said alley as a marker for such conveyance; with improvements, easements, and appurtenances thereunto belonging; in July 1928 A. Loffler Provision Company conveyed to Keane-Loffler, Inc. the property described in the June 1928 deed and an additional irregularly shaped parcel to the west, now owned by plaintiff (J. App. 52, 321-324, Exhibit 11), describing said alley as a marker for such conveyance; the plaintiff and defendants, respectively, own the properties described in the complaint through chains of title, derived by mesne conveyances, from Union Stock Yard Company, their common source of title (J. App. 46, 23, 25); the defendants in 1942 acquired the adjoining property to the north, east and south of plaintiff's property (J. App. 23, 59); on February 4, 1943, plaintiff acquired from trustee in bankruptcy for Adolf Gobel, Inc. property now known for assessment purposes as parcel 168/50, comprising the several separate parcels demised or conveyed separately to Washington Abattoir Company of West Virginia, Loffler, Keane and Auth, A. Loffler Provision Company, Washington Abattoir Company of the District of Columbia and Keane-Loffler, Inc., as mentioned above, together with any and all right, title and interest or estate of Adolf Gobel Inc., in and to adjoining land on the north, east or south (J. App. 47, 273-278, Exhibit 2). The deeds, lease and mortgage noted above were all duly recorded among the land records of the District of Columbia (J. App. 269-324). A resume of the conveyances in the chains of title of the plaintiff and defendants is inserted as an appendix to this brief.

The area claimed as an easement by the plaintiff is correctly described in paragraph 18 of the complaint (J. App. 8-9) as the main alley and auxiliary alley (J. App. 25, 46). The area in question was blocked by defendants; the defendants erected a barricade for purpose of preventing use by any one other than defendants or their permittees (J. App. 23, 46).

The evidence also showed that official records of the U. S. Coast and Geodetic Survey, published in 1895, of a topographic survey made between 1887 and 1891 for the area in controversy, showed the location of Benning Road, the railroad tracks, roadways, the alleys in dispute and the culvert (Plaintiff's Exhibit 14A, J. App. 54, 133), identified thereon to the trial Judge (J. App. 181); the records of the Surveyor for the District of Columbia show parcel 168/50 includes previous parcel numbers 168/5, 168/6, and another northerly parcel (J. App. 133-134); a map showing the alleyways through the Union Stock Yard properties, identified as Map Z51, (Exhibit 26, copy substituted for the original), dated March 11, 1906, on file in, and an official record of, the Office of the Surveyor for the District of Columbia ever since (J. App. 178-179), shows the area known as Parcel 168/50 and surrounding areas, with the alleyways and cross-alleys and a culvert, designates and identifies as alleys the main and auxiliary alleys, identified thereon to the trial judge (J. App. 178-179) with respect to the alley (Main alley) along the length of parcel 168/50 and the connecting alley (auxiliary alley); a record for assessment and taxation of parcel 168/5 and 168/6, now part of parcel 168/50, filed in the Office of the Surveyor for the District of Columbia on October 31, 1906 and an official record of such office (Exhibit 12, photostat substituted for original record, J. App. 134), shows the location and designation of an alley on the east side of such parcels (J. App. 136) and identified thereon to the trial judge (J. App. 136); another Map, identified as Map Y65 (Exhibit 23, J. App. 140, photostat copy marked Exhibit

25 substituted for original, J. App. 178), on file in, and an official record of, the Surveyor's Office of the District of Columbia since 1907 (J. App. 137-139), shows the measurements of parcels 168/5 and 168/6, including the area now Parcel 168/50, and notations of fence and walls on west side of alley (J. App. 138-139), the locations thereon being pointed out to the trial judge; the Benning Viaduct, first part, was completed in 1919 (J. App. 23, 46, 172); an official record plat of the Engineer of Bridges of the District of Columbia, dated March 4, 1920, identified as drawing 203/26 for Benning Viaduct (Exhibit 16, copy marked Exhibit 16A substituted for original tracing, J. App. 172-173) shows the location of the main alley, indicated as the "west side road to stockyards" (J. App. 172), identified thereon by indication to the trial judge as a roadway easterly of the designation "west side road to Keanes" (J. App. 173-174); an official Plot Plan, filed in the Office of the Building Inspector for the District of Columbia in 1936 with an application for work to be done on improvements to the real property now owned by plaintiff, approved by the Building Inspector in 1936 (Exhibit 24, the same as Exhibit 3—the Plot Plan attached to the complaint as Exhibit B—, substituted as copy for the original J. App. 175-176), shows the location of the main alley and auxiliary alley; a photograph of the area of Benning Road adjacent to the Benning Viaduct, taken on July 6, 1939, produced from the office of the Corporation Counsel of the District of Columbia (Exhibit 15, J. App. 55-56), shows the intersection of the main alley with Benning Road, identified thereon by indication to the trial judge (J. App. 89); an old photograph of the scene taken prior to the year 1919 (Exhibit 27, J. App. 213) shows the main alley and auxiliary alley; another photograph (Defendants' Exhibit A13, J. App. 191) shows the main alley, looking north to Benning Road, the cobblestone paving, culvert and northeast portion of one of plaintiff's buildings; other photographs (Exhibits 19a, 19b, 19d and 19e, J. App. 59) show the main alley, auxiliary alley, culvert and a portion of

one of plaintiff's buildings, and (Exhibit 19e) the intersection of the main alley with Benning Road; photographs taken in 1942 (Exhibits 18a and 18b, J. App. 25, 59) show the location of the alley, culvert and portions of buildings on plaintiff's property; a *Plat of computation* of parcel 168/32 obtained by defendants (Defendants' Exhibit 1, J. App. 183) shows the *lines* of the property acquired by defendants and the *lines* of properties adjoining; an actual survey of Parcel 168/50 made by the Surveyor's Office of the District of Columbia, January 14, 1943, *to locate improvements and show rights of way* (Exhibit 13, J. App. 25, 54) showed the plaintiff's property, the alleys and roadways adjacent, and the paving, and the surveyor identified the lines and data thereon, and the alleys and condition of paving, by indication to the trial judge (J. App. 141-145, 157-158).

The trial Judge made a personal inspection at the site in the presence of counsel (J. App. 60, 111-112, 132) and saw the situation as it existed (J. App. 193) from which the finding of fact was expressed (J. App. 30, paragraph 20).

Governmental employees testified concerning official records and the conditions shown in the Topographic Survey (Jordan, J. App. 180-181), Surveyor's records (Fernald, J. App. 133-141, 177-180; Mannar, J. App. 141-146, 157-158), Bridge Engineer's record (Howser, J. App. 171-174) and Building Inspector's records (Kimball, J. App. 174-176).

Testimony, covering the entire consecutive period from 1906 to the date of trial, was received from witnesses (Keane, J. App. 234, Kelle, J. App. 158, Gray, J. App. 243, Knudsen, J. App. 123, Shumate, J. App. 147, Noll, J. App. 150, Mikalaski, J. App. 118, Cudmore, J. App. 152, Alexander, J. App. 131, Schmidt, J. App. 113, Padgett, J. App. 246, Borrowman, J. App. 167, Kengla, J. App. 164 and Cogito, J. App. 61) who were, or had been, corporate officers or employees of the various business activities on the properties, government employees on official business in,

or connected with, such business activities, and other persons, including truck drivers, mailmen and customers, who had used the alley in connection with the various business activities along such alleys, that the main alley and the auxiliary alley were used for general purpose of ingress and egress in connection with the business activities conducted on the properties abutting such alleys, including the abattoir, A. Loffler Provision Company, Loffler, Keane and Auth, Keane-Loffler, Inc., Philips Company, Adolph Gobel, Inc. and the activities during plaintiff's ownership, by trucks, teams, vehicles and by foot, and by anyone having business in such properties and the public in connection with such business activities.

The letter carrier testified (Schmidt, J. App. 112-118) he delivered mail twice a day to the Washington Abattoir and went back into the abattoir grounds both by vehicle and by foot, over the period from 1926 to 1935 or 1936; he used the alley, the roadway on the east side of the abattoir buildings, not only for the delivery of mail but also to get fertilizer for his garden, and it was used by "plenty of others", and "no one restricted us from going in there", that was the only roadway to go back there to get supplies; the vehicular way to the southern part of the abattoir property was only through the roadway on the east side of the property; and it was the only way one could get there; the road was paved with cobblestone coming off Benning Road in front of the entrance to the stockyard office, then cinders, then cobblestone from the culvert back to the extreme end, to the Auth fertilizer plant; he identified the alley and culvert on Exhibit 19b; he went into the driveway nearer the railroad track to get to the sausage building office, on the opposite side.

The government meat inspector testified (Shumate, J. App. 146-150) he worked at the Washington Abattoir or Loeffler plant from 1918 to 1933, he was there every day except Sunday, his office was in the north part of the abattoir and he had occasion to go throughout the abattoir

grounds frequently; the roadway used in connection with the abattoir facilities was on the east side of the abattoir, leading from Benning Road all the way by the building up into the yards and through to the fertilizer factory in the south end of the abattoir; the alley went as far as the south end of the abattoir, that was as far as the wagons had to go, as far as anyone had to go to get anything; farmers would come in there and buy fertilizer and the alley was used to come in and get offal and take it out; it was used during the entire time he was there; and he indicated to the trial Judge on the plat (Exhibit 3) the location of the abattoir facilities, fertilizer factory roadway and alley.

A maintenance carpenter testified (Noll, J. App. 150-151) he worked for the Loffler Company at the place on Benning Road from 1921 to 1928; a road or alleyway ran alongside the east side of the property, from Benning Road to the fertilizer plant, trucks went up there; the roadway was always in use by everyone who went in there, wagons, trucks, "whatever have to go up there—that went in".

The former proprietor of a hotel testified (Mikalaski, J. App. 118-122) that he had a place of business at Benning Road and Anacostia Road from 1921 to 1939; there was a roadway, on the east side of the abattoir property, extending from Benning Road back to the abattoir property, paved with cinders and cobblestones; he used the road about once a week from 1922 to 1929; the road led up to the back of the slaughterhouse; the road was a regular driveway for people to unload cattle and hogs, farmers came in with trucks and wagons, the only way to get in to bring in live stock or to take anything dressed in the slaughterhouse; the people used the road after 1933 for removal of machinery and getting out the "stuff" they were selling; and he identified the road on Exhibit 19.

A truck driver testified (Alexander, J. App. 126-131) that there was a roadway between the first building and the railroad that led up to the sales office and stopped there, and a lane from the Benning Road down between the cattle

pen and the main plant to the fertilizer plant; he used the alleyway from 1920 until the present time, driving trucks from about 1923; it used to have cobblestones on it and in some places it still has old cobblestone, he still uses the same entrance to the property from Benning Road from the time he began to know it.

An insurance salesman testified (Borrowman, J. App. 166-169) that a roadway running from Benning Road alongside the east side of the plant was used by him on three trips to the Gobel Company over a period of a year about 1931 and he has been there frequently in the last three years and the same roadway is there now.

The Assistant District Surveyor testified (Fernald, J. App. 139) that he worked in the field from 1916 to 1922 and passed the stockyards lots of times and there was a road turned in off Benning Road leading into the stockyards and abattoir.

An employee of the Water Department (Quigley, J. App. 171) knew over a period of twenty years that there was an entrance off Benning Road to an alleyway alongside of the east side of the abattoir property.

A surveyor describing indications of alley (Mannar, J. App. 144-145) testified that flagstone paving began at Benning Road and ran from the south side of Benning Road southerly across Parcel 168/80 and along the easterly side of Parcel 168/50 for approximately one-half the full length of Parcel 168/50, the flagstone paving was well defined from the culvert and alongside Parcel 168/50 and the area shown on Exhibit 13 as flagstone paving was a raised roadway over the surrounding area to the southerly end of that parcel (Mannar, J. App. 158).

A retired employee, who in 1928 was then Secretary of the Union Stockyard Co. and signed the deed of 1928 (J. App. 319), (Kelle, J. App. 158-159) testified that he was employed at the abattoir from 1907 to 1910 and was manager for the stockyards from 1924 to 1937; he described the location of the buildings, activities and roads in the area;

all the time he was there, the alley from Benning Road, along the east side of the abattoir property, was used continuously to the abattoir office and properties and to the fertilizer plant for the men to go to work and for trucks and teams; it was necessary to go through several doors, through the cold storage process, to get into the abattoir from the auxiliary alley; once a month the alley was cleaned with a hose; there was no occasion to use the alley all the way through after the fire but operations were continued at the stockyard because it was expected the Gobel Company would rebuild.

A former superintendent of the Loffler plant testified (Knudsen, J. App. 123-126) that he worked there from 1917 until 1929 and described the location of the plant and the stockyards and the facilities on the properties and the uses of the buildings and the roads; the road that came from Benning Road ran along the east side of the building all the way back to the fertilizer plant, was paved with cobblestones, was used for vehicular access to the fertilizer plant and was used all the time by Loffler Company and by Auth, Phillips and by anyone that had business there; the road was used frequently and was the only way to get back there all the time he worked there; the auxiliary alley was also used in connection with the business conducted on the abattoir property.

An employee of Auth-Loffler testified (Cudmore, J. App. 151-157) that he worked for Loffler Provision Company at Benning from 1922 to 1930 and described the location of the plant and the stockyards and the facilities and uses of the buildings and the roads, both the alley and auxiliary alley; a road ran from Benning Road up to the east side of the property and back to the fertilizer plant and was used by practically all the people that slaughtered cattle there and by anyone coming for fertilizer or manure and to get offal products and for anything that was brought in by trucks, and for going in and out to the engineroom; the auxiliary alley was used as a roadway for loading and un-

loading, and for Loffler Manufactured goods, and was used for trucks; the Keane Company, the Loffler Company and the abattoir operated plants along the alleyway, and the Auth Company slaughtered there; the Gobel Company bought out the abattoir and the Keane and Loffler Companies; the passageways to the pens were not the same as the alley because the pen gates could be opened up for cattle passage where the alley was, not an opening, but where they could go right in for loading or anything like that.

A manager for the stockyards testified (Kengla, J. App. 163-166) that he started to work there in May 1937, as manager of the yards, which included continuous operation to keep the buying and selling of live stock active, and continued for about three and a half years, when the yards were closed by the government; he described the alley roadway from Benning Road up to the back holding pens and the fertilizer plant, which was made of cobblestone; the alley was used by the Gobel Company man employed to keep the motors in condition in the abattoir plant; and, the alley and auxiliary alley were used by trucks for removal of metal, pipe and fixtures and everything sold from the plant.

The Court took judicial notice of litigation of the Gobel Company with the District of Columbia concerning reconstruction of the abattoir facilities (J. App. 255).

The plaintiff testified (Cogito, J. App. 60-112, 253-254) that on September 30, 1942 he bought the land west of Minnesota Avenue and south of Benning Road, originally known as Parcels 168/5, 168/6, 168/19, which was designated in 1932 as Parcel 168/50; he inspected the premises about July 10, 1942; there was a paved roadway straight through from Benning Road alongside the east side of the building, south of the culvert there was a fence post dividing the roadway from the property east of the roadway; on the east side of the roadway was a fence with strings of barbed wire; the road was a cobblestone road, with a curbstone; the sides of the building were barricaded

but the roadway was left open; in October, 1942, he first met Mr. Kogod at the site and pointed out to him the alley and auxiliary alley and told him he claimed the right to go over them; the parties were standing at the scene of the alleys then; the alleys were in the same condition then as they are now, with the exception of a little more wear and tear and a little mud on top of the cobblestones; at that time trucks were using the alley unloading lumber; from that time until the present the alley has been used for trucks, cars and pedestrians; there was an exchange of correspondence relative to the roadway (Exhibits 20 and 21, J. App. 325-327); the buildings were remodeled and the buildings were leased to various activities; the auxiliary alley is the only access to the first floor of the north building; more than 10 trucks a day have used the alley since October 1942; in December 1944 the parties discussed a possible sale of part of defendants land, including the auxiliary alley; in the spring of 1943, excavation was begun by defendants up to the alley, plaintiff and defendant met at the scene and plaintiff insisted he had the right to the alley roadway and they did not dig the alley but graded defendant's land up to the alley; in 1946 dirt was being piled on the lot adjoining the alley and Kogod asked plaintiff not to allow the alley to be used for a few days in order to avoid danger to life and property and the plaintiff stopped traffic from using the alley for 2 or 3 days; in 1949 the alley was actually barricaded by four posts anchored with concrete obstructing access from plaintiff's property across the alley; plaintiff's property is zoned and used for commercial purposes and the properties and access facilities were described and identified on exhibits; plaintiff was advised by counsel for the Gobel Company that they had an implied grant of the alley (J. App. 94) by the deed of May 1906 and plaintiff examined the deed at the Recorder of Deeds Office; the gates would swing to close the section but did not completely close the alley or auxiliary alley; the plaintiff could not use the column footings standing on the prop-

erty if deprived of use of the alleys (J. App. 96); when plaintiff acquired the property the driveway shown on the plat with Exhibit 4 did not afford access to every building then on the premises (J. App. 98) and access to the southerly portion of the property was only through the alley (J. App. 110-111); a conversation with Mr. Kogod and Mr. Grossberg related to trucks going through the parking lot, there was no conversation with respect to non-use of the alley (J. App. 254).

Defendant testified (Kogod, J. App. 182-234) he visited the place a good many times between 1917 and 1930 (J. App. 187, 200); around October 1942, plaintiff told him he had a right of way over his property (J. App. 189). Never been any argument over an alley until very recently, argument was using two driveways for his private parking space (J. App. 195); he bought the land as acreage, the contents and material on the property were of no importance to him (J. App. 230), he bought everything that the stockyard owned (J. App. 183); when he bought the property, there were cobblestones on the alley, started a little before the culvert and went back along the easterly side of plaintiff's property (J. App. 203); the culvert and alley were there when he walked around the property before he bought it (J. App. 183-205); and it was then covered with cobblestones, same as now (J. App. 206) and fences led all the way to Benning Road; a roadway—the auxiliary alley ran alongside the building now occupied by the Lumber Company and was there every time witness went there (App. 215); identified the alley on Exhibit 15 (J. App. 221), the purpose of the fence was to keep the cattle enclosed (J. App. 224); the alley is now as it was before February 4, 1949 (J. App. 234).

Witnesses called by the defendants testified that (Keane, J. App. 234-243) the abattoir was known to be in operation in 1906 (J. App. 234); the abattoir and stockyard were not owned by the same people and were separate entirely (J. App. 240); the paved roadway, the alley into the abattoir

east of the paved road, and the auxiliary alley in front of the building were described by indication to the trial judge (J. App. 237-240); there were gates primarily to control passage of livestock (J. App. 238); the alley was used for bringing in livestock for the stockyards or business pertaining to the separate activities at the plant, and for traffic to remove from the plant products sold for delivery by truck; the alley was used by anybody who had a business place in that area (J. App. 239); the stockyards kept the keys to the pens.

From 1909 until 1932 (Gray, J. App. 243-246) there was an entrance to the plant from Benning Road running alongside of the railroad; the main entrance—the alley—was at another point—east of the stockyard office; the alley ran along the whole side of the abattoir property, back to the end of the abattoir property and was used to take the fertilizer out of the abattoir, and run the cattle into the slaughterhouse, and for everything; the location of various gates was described but the witness was apparently confused as defense counsel and the Court indicated to him (J. App. 245).

Around 1928 to 1931 (Padgett, J. App. 246-249), it was necessary to pass through the stockyard property to get to place of employment in the abattoir; the alley was used to get back to the fertilizer plant, and to either side to the pens on the east side and the abattoir properties on the west side; there were gates along the passageway, which were closed to control passage of livestock; the abattoir and stockyard ceased operations for the day at the same time; the gate at the entrance was closed before business started but not locked (J. App. 248).

An attorney for defendants (Grossberg, J. App. 249-253) testified that on one occasion he and Kogod talked to the plaintiff about trucks crossing from various parts of defendants' property into a gate on the east side of plaintiff's property and that plaintiff had promised to keep the gate locked; he also recalled discussion concerning a platform

on the north end of plaintiff's property; he testified that, prior to filing of the suit, he did not know that plaintiff ever claimed he was entitled to a right of way alongside the east part of plaintiff's buildings but, after examination of his letter in October, 1942 (Exhibit 21, J. App. 326) and plaintiff's letter (Exhibit 20, J. App. 325) to which it was in reply, that plaintiff in 1942 alleged there was a roadway but he had forgotten that fact.

At the conclusion of the evidence, the tentative views of the Court were expressed for guidance of counsel in presenting their arguments on the law and facts (J. App. 257) and counsel for both sides fully presented and outlined their respective positions.

RULE INVOLVED

The only rule involved is

FRCivP 52(a) (Findings by the Court):

“(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *”

SUMMARY OF ARGUMENT

The argument is summarized, as outlined in appellee's statement of questions presented, as:

1. The plaintiff established an easement over the defendants' property by express grant, by implied grant, by prescription and by reasonable necessity of which the defendants had actual and constructive notice.

- (2) Alleys, described in recorded instruments, shown on official documents, used for general purposes, to adjoining

properties, consistently and adversely, since 1906, are easements to the adjoining properties.

(3) The plaintiff has not abandoned and is not deprived of the right to an easement over defendants' property.

(4) The defendants are charged with actual and constructive notice of plaintiff's right to an easement over their property.

ARGUMENT

Basically, the plaintiff maintains that defendants' title to the land on the east and north of plaintiff's property lines is subject to an easement in favor of the plaintiff in alleys and plaintiff has a right to use the alleys for access to plaintiff's property.

Easement Established

In 1887 the Union Stock Yard Company acquired all the property now owned by the plaintiff and the defendants. The plaintiff maintains that he has an easement for use of roadways within the boundaries of defendants' deed lines.

The properties involved are shown on the Plot Plan (Exhibit 3). The diagram inserted in appellants' brief was not used during the trial and, while it shows the areas of ownership, it does not reflect the access uses to the various properties adjacent to the alleys, as is shown on the Plot Plan which was used by various witnesses in indicating locations and uses.

The alleys are necessary for proper use of plaintiff's property and from the practical point of view it is immaterial on what theory of law the easement is applicable. The record is voluminous with the evidence relative to the facts. "There is no question about there being an alley alongside these premises for a great many years" (J. App. 91).

By mesne conveyances the Stockyards properties were acquired by plaintiff and defendants. Plaintiff's property

comprises four original parcels, demised and conveyed separately by the Stockyard Company in 1890 and subsequent years, which abut upon and adjoin the alleys. Defendants' deed lines include the areas of the alleys. Various activities have been conducted on the properties now owned by plaintiff from 1894 and the alleys have been used continuously in connection with such activities.

The alleys were in existence when the Federal government topographic survey was made between 1887 and 1891 (Exhibit 14A) and the alleys were identified to the trial judge (J. App. 181). The alleys were also shown on a map of the Union Stock Yards, on file with the District Surveyor since March 11, 1906 (Exhibit 26), a public record under Title 1, Section 608 of the District of Columbia Code, and the alleys were identified to the trial judge (J. App. 179).

The main alley was shown on a plat filed in the Land Records with the 1890 lease (J. App. 287) and was described as a boundary or course call in the 1890 lease (Exhibit 4, J. App. 279), the 1894 deed (Exhibit 5, J. App. 289), the 1906 deed (Exhibit 6, J. App. 293), and 1928 deed (Exhibit 10, J. App. 317). In addition the alley is described as a boundary or course call in deeds in 1904 (Exhibit 7, J. App. 299), 1916 (Exhibit 9, J. App. 213), July 1928 (Exhibit 11, J. App. 321) and in a 1910 mortgage of the Stock Yard Company encumbering the property now owned by defendants (Exhibit 8, J. App. 307).

The facilities of the Abattoir, originally on only part of the property now owned by the plaintiff, were enlarged and extended, and other business places were conducted in different parts of the property now owned by the plaintiff; access could not be obtained to or from the center or southern portions of the properties without use of the main alley and auxiliary alley; and the alleys were used by the Stockyard for access to the livestock pens, and also used by the Abattoir facilities and the Auth, Loffler, Keane, Phillips and Gobel Companies and those having business with them for access to such properties.

The plat (J. App. 287) filed with the 1890 lease (J. App. 279) was a public record in the Land Records of the District of Columbia. While the lease was later surrendered by the lessee, the line of the demise using the alley as a boundary marker remains of record. In addition to the description of the demise and a Driveway right of way, the lessor covenanted that, during the term of the lease, the lessee should have and enjoy the land demised and the right of way "together * * * with the appurtenances" (J. App. 282). At that time, the alley was certainly appurtenant to the demise.

The 1894 deed (Exhibit 5, J. App. 289) conveyed a parcel described as bounded by the alley, and with the parcel was conveyed "the easements, rights, ways and appurtenances thereto belonging", and, also, the right of way over the "Driveway".

The 1906 deed (Exhibit 6, J. App. 294) conveyed another parcel, describing the eastern line of the property "on the west line of said alley", "together with all the rights, privileges and appurtenances, easements and rights of way to the same belonging or in anywise appertaining but not including the use of any alleys south of the north line of the property hereby conveyed" (J. App. 295). Plaintiff's claim, and the easement described in the injunction, does not extend south of the north line of this conveyance.

The 1928 deed (Exhibit 10, J. App. 317) conveyed the irregular parcel, in which the alley is described as a boundary or course call, "with the improvements, easements and appurtenances thereunto belonging".

Without repeating in haec verba the formal wording of the various recorded instruments, the deeds in plaintiff's chain of title included conveyance of "the rights, privileges, appurtenances, easements and rights of way to the same belonging or in anywise appertaining" (Exhibit 7, J. App. 300, Exhibit 9, J. App. 316, Exhibit 11, J. App. 322 and Exhibit 2, J. App. 276).

By express grant or implication

The appellee respectfully submits that under the decisions of this Court the alleys are easements for plaintiff's property.

Simply stated, the deeds of conveyance describing the property as being bounded by the alley and conveying all the easements appertaining to the property, the easement of the grantee in the alley became fixed, and the title of subsequent grantees of other parcels became burdened with the easement.

In *Scaggs v. Gallagher*, 45 App. D.C. 450, a similar situation was presented. In that case, the properties front on Georgia Avenue and there was an alley in the rear; the deed described the parcels as being bounded by an alley, and with the parcels was conveyed "all the improvements, ways, easements, privileges, rights, appurtenances and hereditaments;" the alley was used in common by the owners of the different parcels adjacent to the alley and was reasonably necessary for enjoyment of plaintiff's property; and this Court said (page 453):

"* * * That this alley had been assessed for taxes as the property of the trustees and never had been accepted as a public alley is quite beside the question. The moment the trustees conveyed the Gallagher parcel with a recognition of the existence of this alley, which was reasonably necessary to the enjoyment of the parcel conveyed, the easement of the grantee became fixed and the title of subsequent grantees of the other parcels, including the grantee of this alley, was burdened with this easement. The rule is so well established and has been so frequently and carefully stated that we shall not dwell upon it. * * *"

and (page 454),

"* * * In view of the situation then existing, it is too plain to admit of doubt that the existence of the alley was taken into consideration by the parties when the sale of the Gallagher parcel was made. Having sold

that parcel with reference to the alley, the grantors could not thereafter derogate from their grant by interfering with the enjoyment by the grantee of the easement impliedly granted. And what could not be done by the original grantors obviously may not be done by appellants, their grantees”.

Mr. Chief Justice Alvey, in the opinion of this Court in *Wood v. Grayson*, 22 App. D. C. 432 (See also 200 U.S. 257, 271; 50 L ed. 470, 477), with reference to a right to light and air, (page 446) stated that it is

“* * a well settled rule of construction that the grant of a principal thing shall be held to carry with it all that is reasonably necessary for the enjoyment of the thing granted, for the purpose for which, according to the obvious intent of the parties, the grant was made; and that a grant is always to be taken strongly against the grantor * * . The deed of trust * * by express terms, not only recognizes the existence de facto, but the user, of easements of ways, rights and privileges, as appurtenant to the said building. * * It is competent to arrive at the necessary extent of the space or area by what the parties have done in regard to it, and what they have recognized as reasonably necessary in actual use.”

And, Mr. Chief Justice Alvey (page 449) also quoted the words of Mr. Justice Story in *United States v. Appleton*, 1 Sumn. 492, Fed. Case No. 14,463, as follows:

“In truth, every grant of a thing naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for.”

In *Robinson v. Hillman*, 36 App. D.C. 241, 247, this Court said:

“The rule of the common law is well settled by a long line of authorities that where the owner of an estate uses a quasi easement of an apparent and continuous character over one part of his estate, for the benefit of the other part, and which is reasonably necessary to

the enjoyment of that other part, and subsequently conveys the quasi dominant part to one person and the quasi servient to another, the grantees, in the absence of express provision, will take the respective parts burdened or benefitted as they were prior to the division."

In *Frizzell v. Murphy*, 19 App. D.C. 440, 445, this Court said:

"By this severance, what was at that time a mere quasi-easement for the benefit of the building on Lot No. 5 became a fixed and permanent easement by implied grant, and the owner thus conveying the one lot as the quasi-dominant tenement could not derogate from his grant or deny to his grantee, or those claiming under the latter, the use and benefit of what was at the time of the severance of the units of ownership an open and apparent easement reasonably necessary to the enjoyment of the part granted. The principle seems to be well settled, both upon principle and authority, that where the owner of both the quasi-dominant and quasi-servient tenements conveys the former, retaining the latter, all such continuous and apparent quasi-easements as are reasonably necessary to the enjoyment of the property pass to the grantee, giving rise to an easement by implied grant, * * 'when a man grants a thing he must be considered as granting that which is necessary in the proper sense of the word for the enjoyment of that which he grants, and he cannot derogate from his own grant; he cannot do that which will destroy or render less effectual that which he has granted. But as regards reservation, the matter stands on principle in a very different position. To say that a grantor reserves to himself in entirety that which may be beneficial to him, but which may be most injurious to his grantee, is quite contrary to the principle on which an implied grant depends. That principle is that a grantor shall not derogate from or render less effectual his grant or render that which he has granted less beneficial to his grantee'. * * "Upon the grant by the owner of a tenement of a part of that tenement as it is then used and enjoyed, there will

pass to the grantee all those continuous and apparent easements (by which, of course, is meant quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted. But if the grantor intends to reserve any right over the part or tenement granted, it is his duty to reserve it expressly in the grant."

In *Wilson v. Riggs*, 27 App. D. C. 550, 554, this Court said:

"It was well said that 'a grantor cannot derogate from his own grant, while a grantee may take the language of the deed most strongly in his favor. The law will imply an easement in favor of a grantee more readily than it will in favor of a grantor'."

The rule is stated in 17 American Jurisprudence, Easements, Section 46, as:

"As a general rule, where a conveyance of land calls for a way or street as a boundary and the grantor owns the fee in the land represented as the way or street, he is estopped, as against the grantee, to deny that it is a way or street; and an easement therein passes to the grantee by implication of law. This easement is not only in that part which adjoins the grantees own land, but also, by necessary implication, in such portion of the whole as will make the same available and useful as an appurtenance to the estate granted."

See also 16 Am. Jur. Deeds, sec. 290; 293-4.

In view of the decisions of this Court cited above, it seems unnecessary to refer to other authorities.

The following citations, however, are in point:

Faulks v. Schrider, 69 App. D.C. 137; 99 Fed. (2d) 370
Greenwalt v. McCardell, 178 Md. 132; Atl. (2d)
Lampman v. Milks, 21 N.Y. 505
Wells v. Garbutt, 132 N.Y. 430; 30 N.E. 978

The case was fully argued by counsel for both sides (J. App. 255-268). With respect to the claim of easement by deed or implication, plaintiff contended that defendants' deed title is subject to plaintiff's easement (J. App. 258, 266); although the defendants had a deed conveying title to the alleys, the plaintiff has the right to use the alleys by easement and defendants' ownership was restricted as to the alleys by the easement which was paramount to defendants' rights (J. App. 258, 266-267); the alleys were in existence at the time of the deeds from the common source of title (J. App. 255-256); the alleys were designated in the deeds and are appurtenances to plaintiff's property (J. App. 258) restricting the defendants' ownership of the alleys; defendants' position was that whatever right the plaintiff has is merely a right of use by permission (J. App. 262).

The cases cited by defendants with respect to this subject do not seem to be applicable to the point involved. Apparently, defendants misconstrue the plaintiff's position. The plaintiff contends there is an easement by express grant or implication because the alleys were in existence at the time of the deeds from the common source of title, described as boundaries of the property conveyed, and used as alleys for such properties. The area of the easement is certainly not in dispute (J. App. 25). There is no claim, and none granted, for an easement beyond the area restricted by the 1906 deed (Exhibit 6, J. App. 295). The easements are those which were in existence at the time of the deeds (Exhibits 14A and 26, J. App. 180, 178). These rights were in existence, they are not new rights.

There seems to be a contention that the existence of the "Driveway" excluded any other way. This could hardly be the fact as the deeds included conveyance of easements and appurtenances and, also, the "Driveway" (J. App. 291, 295, 300, 316, 319 and 322). Easements in the alleys were restricted only in the 1906 deed (Exhibit 6, J. App. 295) as to the area south of the north line of the conveyance and no

easement is claimed or granted beyond this point. If easements in the alleys were reserved or restricted, the grantor could have expressly so stated in the deeds, as was done in the 1906 deed. *Frizzell v. Murphy, supra*.

In *Scaggs v. Gallagher, supra*, Gallagher's property fronted on Georgia Avenue, and the alley was in the rear. In this case, there is a "Driveway" and alleys. In principle, there seems to be little difference and the decision in *Scaggs v. Gallagher, supra*, seems to apply here with equal force.

A contention that the easement is limited appears inapplicable. The area is not in dispute (J. App. 25). The use has been general for the various activities engaged in business along the alleys for vehicles and pedestrians (J. App. 112-118, 146-150, 150-151, 118-122, 126-131, 158-159, 123-126, 151-157, 163-166, 239 and 246) and the Court so found from personal inspection at the site (J. App. 30) FRCivP 52(a).

To avoid confusion it should be noted that the "Driveway" and the claimed easement are not the same. The former is at the northwest corner of plaintiff's property; the latter on the east and north.

By prescription

The trial judge found, as a fact, that the alleys have been used by the plaintiff and his predecessors in title in their occupancy of the real property now owned by the plaintiff for general purposes of passage for ingress and egress thereto and such use has been uninterrupted, continuous, open, notorious, hostile and adverse for such general purposes since prior to the year 1906 (J. App. 26).

In *Bonds v. Smith*, 79 U.S. App. D.C. 118, 120, 143 Fed. (2d) 369, this Court said:

"Anyone rightfully in possession of premises to which an easement is appurtenant may enjoin its obstruction."

Appellants contend that a prescriptive right to use the alleys was not established. In their brief, appellants say the "evidence in this case was uncontradicted, clear and unequivocal that at all times prior to 1933 the alleys in question were used by permission of the Stockyard Company" (Applt. Brief 12-13). Yet, in the third sentence following, the appellants say "No formal permission appears to have been given to use the alleyways" (Applt. Brief 13). Appellants, then, refer to testimony of defense witnesses, respecting gates and keys and one occasion when access was prevented, and overlook or brush aside the other evidence.

The trial judge had the opportunity to see the witnesses on the stand and to see the places indicated by them on various exhibits, which were apparent to the trial judge, from their testimony, in many instances indicated by "here and there" (J. App. 240); in addition, the trial judge made a personal inspection at the site and saw the situation as it existed (J. App. 193).

The record shows the evidence as to the existence and use of the alleys. The testimony of the witnesses and substance of the Exhibits are summarized in the Counter Statement of the Case, Summary of the Evidence (pages 6 to 20), *supra*.

The alleys are graphically shown on plaintiff's Exhibits 3, 14A, 19A, 19B, 19D and 26 and defendants' Exhibit A 13.

In brief, the evidence shows that the alleys, one extending from its entrance at Benning Road to and alongside the east side of the old abattoir property to its south end, paved with cobblestones, and the other between a paved road on the west side and the alley on the east, were in existence and used, since prior to 1906 (Keane J. App. 234, Kelle J. App. 158, Gray J. App. 243, Knudsen J. App. 123, Shumate J. App. 147, Noll J. App. 150, Mikalaski J. App. 118, Cudmore J. App. 152, Alexander J. App. 131, Schmidt J. App. 113, Borrowman J. App. 167, Kengla J. App. 164 and Cogito J. App. 61); the alleys were used, continuously

and frequently, to the abattoir office and properties, and for the properties along the alleys, for men to go to work, and for trucks and teams and wagons, for vehicular traffic and by foot, and by Loffler, Auth, Phillips and anyone that had business there, for delivery of mail, for anything brought in by trucks, for loading and unloading, for manufactured goods, by everyone who went in there, and by anybody who had business for that area, "whatever had to go up there—that went in", and "no one restricted us from going in there"; the alley was the only roadway to get supplies or to get to the rear of the abattoir and the only vehicular way to the southern part of the property or to take anything from the slaughterhouse, and access to portions of the property could only be obtained through the alleys. (Schmidt J. App. 112-118, Shumate J. App. 146-150, Noll J. App. 151, Alexander J. App. 126-131, Kelle J. App. 158-159, Knudsen J. App. 123-126, Cudmore J. App. 151-157, Kengla J. App. 163-166 and Cogito J. App. 60-112). Continuity of use and possession by plaintiff and his predecessors in title was established by witnesses from 1906 to the present time; continuity of ownership was admitted (J. App. 25).

The appellee respectfully submits that the findings of fact were amply supported by the evidence. The appellants' statement that the findings "were utterly without foundation" seems to ignore the evidence before the Court.

The appellee respectfully submits that the facts and ruling in this case are in accord with, and not contrary to, the decision of this Court in *Umhau v. Bazzuro*, 76 U.S. App. D.C. 394, 133 Fed. (2d) 256, cited by appellants. In the *Umhau* case, the alley was not provided with an outlet to surrounding streets and there was only occasional use of the property at the end of the alley, sometimes with express permission, and the use appeared to have been allowed as a friendly accommodation. In this case the alleys extended to, or had access to, an entrance on Benning Road, were used day after day over a period of approximately 50

years, without any evidence of even one instance of formal permission. It is submitted that the ruling in this case is supported by the *Umhau* case.

Certainly the plaintiff was entitled to the rights of his predecessors in title. As was said in *Bonds v. Smith*, *supra*:

“In the case of easements, as is true of acquisition of title by adverse user, generally, the privity which is necessary to permit tacking may be of estate, blood or contract. A devisee can tack his possession to that of his devisor; the tenant's possession is that of his landlord.”

See also, *Middletown Realty Co. v. Roland Park Civic League*, Md. , 78 Atl. (2d) 200.

In *Wilson v. Waters*, 192 Md. 221, 64 Atl. (2d) 135, 136, the Court said:

“It may be stated as a general rule that when a person has used a roadway over the land of another openly and continuously and without objection for twenty years, it will be presumed that the use has been adverse under a claim of right, unless it appears to have been by permission. To prevent a prescriptive easement from arising from such use, the owner of the land has the burden of showing that the use of the way was by license inconsistent with a claim of right. * *”

In *Smith v. Shiebeck*, 180 Md. 412, 24 Atl. (2d) 795, 800, the Court said:

“* * * It is a familiar principle that to establish a right of way by prescription it is necessary to prove an adverse, exclusive and uninterrupted use of the way for twenty years. The term ‘adverse use’ means use without license or permission, for an adverse right of an easement cannot grow out of a mere permissive enjoyment. Where, however, a person has used a right of way for twenty years unexplained, it is fair to presume that the use has been under a claim of right, unless it appears to have been by permission. In other

words, the use of a way whenever one sees fit over the land of another, without asking leave is an adverse use, and the burden is upon the owner of the land to show that the use of the way was by license or contract inconsistent with a claim of right."

In *Potomac Edison Co. v. Routzahn*, 192 Md. 449, 65 Atl. (2d) 580, 585, the Court said:

"* * * When a person has used a roadway over the land of another openly and continuously and without objection for twenty years, it will be presumed that the use has been adverse under a claim of right, unless it appears to have been by permission. To prevent a prescriptive easement from arising from such use, the owner of the land has the burden of showing that the use of the way was by license inconsistent with a claim of right.' "

In *Greenwalt v. McCardell*, 178 Md. 132, 138, — Atl. (2d) —, the Court said:

"* * * A way of necessity by implication of law does not arise from an express grant, but from a presumption that it was the intention of the parties that the grantee should have access to his land over the land of the grantor. * * * Where an easement exists as a result of an express grant, its use may of course be enjoyed accordingly. 19 C. J., Easements, sec. 218. Necessity of itself does not create a right of way; it is merely a fact offered in evidence to show an intention to establish a right of way by raising the presumption of a grant. Whether or not an easement is intended depends upon the provisions of the deed and the facts in each particular case."

In *Wilson v. Waters, supra*, the Court also said:

"* * * We adopt the rule that if a road led at its start only to the premises of the persons using it, such circumstance is sufficient to prove their user under a claim of exclusive right, in the absence of proof to the contrary. If a road, which was started in such a manner

as to make the user adverse and exclusive, is afterwards enjoyed in common with the public, the user does not lose its exclusive character as the result of the joinder of the public therein. * * * Since plaintiffs testified that they had used the road in this case without objection for more than twenty years, we think the jury had the right to determine that defendant and her predecessors in title would not have acquiesced in the user of the road for so long a period, when it would have been to their interest to have stopped it, unless they believed that the parties using it had a right of way, of which they should not be deprived. The right of way cannot prejudice anyone except the present owner, who waited many years before she barricaded the road. An easement over her land by prescription is sanctioned by public policy."

Appellants contend that the use of the alley was by permission only because there were gates across the alleys which were locked. However, this was an issue of fact which was determined by the trial judge in favor of the plaintiff.

As expressed by one of plaintiff's witnesses, "there were gates to the pens" but the passageways to the pens were not similar to the alley, because the pen gates could be opened up for cattle passage—where the alley was, not an opening, but where they could go right in for loading or anything like that (Cudmore, J. App. 156). In fact, defendants' witnesses testified that the gates were primarily to control passage of livestock (Keane J. App. 238), the gates were closed to control passage of livestock (Padgett J. App. 247); and the purpose of the fence was to keep the cattle enclosed (Kogod J. App. 224) and the stockyard company kept the keys to the gates, as they kept the keys to all the pens (Keane J. App. 241). It is respectfully submitted that the trial judge was correct in finding that the gates were there for convenience to keep the stock enclosed and not to bar the easement.

While one of defendants' witnesses testified the gate at the entrance was always locked at night (Keane J. App.

238), another defense witness could not recall seeing it locked (Padgett J. App. 248) and another defense witness was undoubtedly confused as to the location of the gates (Gray J. App. 245).

Appellants also contend that on one occasion over a period of approximately fifty years the stockyard prevented access to the alley. Apparently, however, the trial judge did not give credence to this testimony (J. App. 265).

It is also a matter of interest that defendants' counsel had advised the Court that the gates were closed by the Stockyard Company "*and anybody who used that way*" (J. App. 44) and the same interests did not, in fact, control the abattoir and stockyards (J. App. 44).

Although the evidence is in conflict as to closing of the alleys by gates, it is respectfully submitted that, even though this fact was conceded arguendo, this would not bar the easement.

In *Preston v. Siebert*, 21 App. D.C. 405, 414, this Court said:

"* * * Every case probably depends upon its own circumstances, and usage and custom undoubtedly have much to do with the question of the reasonableness of an apparent obstruction. Every gate over a right of way is to a greater or less extent an obstruction; but if the circumstances are such that it constitutes no more than a reasonable protection to property, which all the parties might well be supposed to have anticipated when the right of way was created, and if it is such an obstruction as does not unreasonably or in any substantial manner interfere with the use of the right of way, a gate should not be regarded as an unlawful impediment to the owner's enjoyment of such right of way."

In *Campbell v. Bishields*, — Md. —, 80 Atl. (2d) 262, 266, the Court said:

"The mere fact that a gate has been erected across a roadway, to the use of which one has acquired a prescriptive right, does not destroy such right but merely limits it."

In *Wynne v. Boone*, 88 U.S. App. D.C. —, 191 Fed. (2d) 220, 79 WLR 779, this Court said:

"In this case, * * * the evidence was not primarily documentary. Oral testimony, dependent upon the 'candor and credibility of the witnesses,' * * * was the crux of the case. The trial judge saw and heard the witnesses; we have done neither. Under Rule 52 we must give due weight to the opportunity which he thus possessed. We must recognize that the trial judge may disregard the testimony of a particular witness 'even in the absence of any direct conflicting testimony. He (the witness) may be contradicted by the facts he states as completely as by direct adverse testimony and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, *although there be no adverse verbal testimony adduced*.'" (Emphasis supplied.)

Appellants' counsel apparently gives credence only to the testimony of his witnesses, ignoring the circumstances related by other witnesses in the case, which the trial judge considered important (J. App. 265, 30-31). In the closing argument, counsel for the defendant stressed the testimony of defense witnesses respecting closing of the alleys and that the alleys were used with permission (J. App. 262-265); notwithstanding, the judge disagreed (J. App. 265).

In *Remington Rand, Inc. v. Societe Internationale*, — U.S. App. D.C. —, — Fed. (2d) —; 79 WLR 851, this Court said:

"* * * The evidence was of varied nature, with many witnesses and documents. Much of this evidence, oral and written, bore upon the aforesaid issues. There were some conflicts. Credibility and accuracy had to be appraised; statements, writings, and actions had to be interpreted, all to the end that the true nature and pur-

pose of Interhandel's declaration be justly determined. That was the vital question. * * * Where a trial involves disputed factual issues a choice must always be made between opposing versions of the evidence. In this case the law imposed that high duty and responsibility upon the presiding judge. His preferred opportunity for just appraisal of the witnesses and fair comparison and evaluation of the evidence is recognized in the law's command that 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses'."

See also *Wynne v. Boone*, *supra*, and *Fox v. Ewers*, — Md. —, 75 Atl. (2d) 357, 358.

In the appellant's Brief (page 5) comment is made that before any argument of counsel, the Court indicated his conclusions. A correct decision is none the less effective because the judge expresses his tentative views to counsel, so that these points may be covered in the argument, or if the judge, during the argument, comments on the weight of the evidence, even though counsel may be annoyed that the judge does not adopt his views. Indeed, it is now expected in appellate practice that much of the time allotted counsel for argument will be used to reply to interrogation from the Bench. Yet, the written opinion, as signed Findings, expresses the decision of the Court and the decision is nonetheless effective, even though the matters presented in the time for argument do not conform to counsel's planned presentation. In this case, the various matters involved were fully presented in the argument and the Court decided against the contentions of the defendants.

It is respectfully submitted that the cases and authorities cited by appellant on this subject do not apply to the facts in this case.

Easement not Abandoned

The right of the plaintiff and his predecessors in title to use the easements was not abandoned.

Extensive reference to the evidence, in the summary and argument, has already been made in this brief and it would be repetitious to review it. In brief, the testimony shows the continuous use of the alleys for general purposes in connection with the businesses conducted on plaintiff's property, prior and subsequent to his purchase, to the present time, in so far as access was needed to the property, at all times; even during the time when the use was limited because of litigation with governmental authorities, the alleys were used for any required purposes; and, since plaintiff's ownership, used until the obstruction was placed by defendants in 1949, although on one occasion it appeared that defendants had intended to grade off the alley and, when the plaintiff protested and claimed his right to the easement, the alley use was not interrupted (J. App. 78).

The alleys were easements and conveyed as appurtenances under the deeds (*supra*).

This Court, in *Brunthaver v. Talty*, 31 App. D.C. 134, with respect to use of an alley, said:

"Mere neglect to enjoy an easement created by grant has no greater effect to extinguish the right of the grantee thereto than to the freehold to which it is appurtenant,"

"* * * There is no way, in our opinion, in which an easement created by grant can be extinguished by abandonment,—that is to say by nonuser,—unless there has been, in connection with acts inconsistent with the intent to use, some acquiescence in its obstruction by another for a reasonable period at least, or some representations that would work an estoppel. Nothing whatever was done by the successive owners of the lots abutting on the alley, in this case, to prevent the enjoyment of the easement by the defendant or those under whom she claims. * * * Complainant had no right to assume, in the face of recorded titles under which both parties held, and the unobstructed condition of the alley, that defendant had forever relinquished her right to its enjoyment. * * *"

Reaffirmed in *Faulks v. Schrider*, 69 App. D.C. 137, 99 Fed. (2d) 370.

See also *Kelly v. Laurence* (in *eo Nomine Nail Co. v. Furnace Co.*), 46 Ohio St. 544, 22 NE 639.

In *Penn Bowling Alley v. Hot Shoppes*, 86 U.S. App. D.C. 58, 179 Fed. (2d) 64, cited by appellants, this Court held that misuse of an easement is not an abandonment. In that case, the owner of the dominant tenement subjected the servient tenement to a use not only for the dominant tenement but also for other property adjacent, not entitled to the easement. In this case, the dominant tenement is all the property now owned by plaintiff, conveyed in several parcels by separate deeds from the common source of title with the easements. In the *Penn Bowling Alley* case, the dominant tenement subjected the servient tenement to an additional burden for parking vehicles. In this case, the use is only for passage, as always.

The evidence in this case shows that the deeds conveyed general easements and they were in use as such; the easements were not granted for or restricted to any specific uses or particular purposes. The facts are not similar to the situations to which appellants refer. It is respectfully submitted that the cases and authorities cited by appellants are not applicable to this case, either with respect to discontinuance of the abattoir or the general right of passage.

Actual and Constructive Notice

The trial judge found that the defendants acquired title with actual and constructive notice of the easements (J. App. 31).

The evidence established that the Land Records of the District of Columbia showed the existence of the alley in the recording of the lease in 1890, to which was appended a plat (J. App. 287), and in the Recording of deeds and encumbrances, affecting the title to the property owned by both parties, describing the same as boundary markers or course calls, (J. App. 289-324); and, in addition, the alleys were

shown in the government record of the topographic survey (Exhibit 14A) and in the plat filed in the Surveyor's office (Exhibit 26), all of which were public records and of which the defendants were charged with constructive notice.

In addition, the testimony showed (J. App. 182-234) that defendant was familiar with the property (J. App. 187) since 1917 (J. App. 200); had visited the place a good many times between 1919 and 1930 (J. App. 187); before he purchased the property in 1941 he went there to inspect it with a real estate agent (J. App. 185); he bought the land as acreage, the contents and material on the property were of no importance to him (J. App. 230); he bought everything that the stockyard owned (J. App. 183); when bought the property, the alley was partially paved with cobblestones which extended back alongside plaintiff's property further than the present iron gates (J. App. 202); looking south from Benning Road to the Rear of plaintiff's grounds, the alley was covered with cobblestones "same as it is now; hasn't been changed" (J. App. 206) and the auxiliary alley was there every time he went there (J. App. 215); and, the alley is now as it was before February 4, 1949 (J. App. 234) and the old photograph (Exhibit 27) was a true picture of the place, as it was prior to 1919 (J. App. 210).

On this evidence and the other circumstances in the case, it is respectfully submitted that the defendants' had actual and constructive notice of the alley and the finding of the Court to this effect was amply supported.

Appellants contend that they are innocent purchasers and reference is made to various parts of defendant's testimony. As indicated above, in addition, the Court had before it evidence of other circumstances in the case; which were proper to be considered in determining the weight to be given Defendant's testimony. *Wynne v. Boone, supra*.

Appellants stress the fact that "he also had a survey made and had the title examined" (Applt. brief page 19). It is obvious that his survey (defendants' exhibit 1) was only to cover the *computation* for boundary lines for the

description in his deed; in fact, if defendants had requested a survey *showing rights of way*, as was the case in plaintiff's survey (Exhibit 13), the survey would have clearly shown the existence of the alleys, the "Driveway" and the conditions seen by the surveys (J. App. 141-146, 157-158). There was no change in the paving of the alleys from his own testimony (J. App. 206) and, it is respectfully submitted, that the defendants' survey only gave an outline description of the property for the scrivener of the deed, and, the survey shows simply the lines of his deed (J. App. 200). It is also obvious that the Land Records gave public notice of the easement and such facts must have been noted, or should have been, if the title was examined.

As has been said in automobile accident cases, "if he had looked he would have seen" what the Surveyor saw and recorded (Exhibit 13).

Some point is also made that defendants have made extensive improvements to the property, since acquiring it. Defendants certainly cannot say that they did not have notice of the plaintiff's claim because both plaintiff and defendant met at the scene and discussed the situation (J. App. 66-67, 78, 189) and plaintiff also asserted his rights in a letter to defendants' counsel in 1942 (Exhibit 20). Notwithstanding, the defendant said there "has never been an argument over the alley"; the argument concerned the use of the parking space (J. App. 195), which, incidentally, is not included in the easement.

Testimony was in conflict as to a claim that plaintiff had agreed to lock the present gates on his property. Defendant testified there was a conversation to that effect (J. App. 190). A defense witness said he recalled such a conversation (J. App. 250) but this same witness found himself contradicted as to his testimony respecting plaintiff's claim to an alley by his own correspondence (J. App. 252-253). The plaintiff denied the conversation was to that effect, (J. App. 254).

It is also interesting to note that defendants assert their innocent purchase without notice of the easement and, yet, the defendants now concede that plaintiff has an unrestricted general easement in the "Driveway" (J. App. 200), although the area of the "Driveway" was included in the lines of his deed and the "Driveway" was not shown in his survey (J. App. 200), and this certainly was not his position when he first met plaintiff and told plaintiff he was landlocked without access (J. App. 226).

It is also interesting to note that at first defendant testified that the alley was not, and is not, cobblestone at its intersection with Benning Road (J. App. 204) and, yet, when expressly asked by the judge, who had by then inspected the property and undoubtedly seen the fact existing and had the point in mind, somewhat modified his statement (J. App. 206-207). It seems a matter of fair comment, it is respectfully submitted, that defendant appeared to be consistent only in being inconsistent.

In view of the evidence before the Court, it is respectfully submitted that the defendants are charged with actual and constructive notice of the easement and the Finding is supported by the evidence.

Wynne v. Boone, supra.

Remington Rand v. Societe Internationale, supra.

CONCLUSION

It is respectfully submitted that the plaintiff is entitled to the judgment enjoining the obstruction of the easements established and the findings and judgment are correct and should be affirmed.

Respectfully submitted,

H. WINSHIP WHEATLEY,
H. WINSHIP WHEATLEY, JR.,
1010 Vermont Avenue, N.W.,
Washington 5, D. C.,
Attorneys for Appellee.

APPENDIX

Resumé of Conveyances in Chains of Title

1. Common Source

On the 14th day of October, 1887, (J. App. 269), Union Stock Yards purchased a tract of land in Benning, D. C., "with the buildings, rights, privileges and appurtenances, to the same belonging, or in anywise appertaining, and all the estate, right, title, interest, claim, and demand whatsoever both at law, and in equity of said parties of the first part, or either of them of, in, and to the same. To HAVE AND TO HOLD said parcels of land and premises with the appurtenances unto said party of the second part, its successors and assigns for its and their use and benefit forever." (J. App. 271).

2. Chain to Plaintiff

(a) On the 26th day of February 1890 (J. App. 278), Union Stock Yards leased a portion of the above premises to Washington Abattoir Company of West Virginia, described in part as follows:

"Beginning for the same at the corner formed by the face of the wall on the south side of the branch and the fence on the west side of the Main Alley in said grounds" (emphasis supplied) with description as per plat attached Marked "A" (J. App. 287). (This lease was for forty Years.)

(b) On the 20th day of September, 1894 (J. App. 289) Union Stock Yards sold to Washington Abattoir Company of West Virginia the leased premises with some additional land thereto and, for the consideration of five dollars and the surrender of the lease, granted, bargained, sold and conveyed "to Washington Abattoir Company of West Virginia, and its successors forever, a parcel of ground situate at Bennings in the District of Columbia, being part of the grounds now occupied by the said Union Stock Yard Com-

pany as a stock yard, bounded by a line *beginning at the corner formed by the face of the wall on the south side of the branch and the fence on the westerly side of the Main Alley in said grounds;*" (emphasis supplied) with a course description of Parcel sold (J. App. 291) "with the easements, rights, ways and appurtenances thereto belonging; * * * To have and to hold the same, with the improvements, rights, ways, easements and appurtenances, unto and to the use of the said Washington Abattoir Company, and its successors forever; and the said Union Stock Yards Company doth for itself, its successors and assigns, covenant and agree with the said party of the second part, that it, the said party of the second part and its successors, shall and lawfully may peaceably and quietly have, hold, and enjoy the said parcel of land herein granted, with the easements and appurtenances thereof, * * * without let, suit, trouble, molestation, expulsion or interruption by the said party of the first part, its successors or assigns." (J. App. 292)

(c) About 10 years later, on the 31st day of December, 1904 (J. App. 299), Washington Abattoir Company of West Virginia sold to Loffler, Keane and Auth and granted, bargained, sold, aliened, enfeofed, released, and conveyed the property conveyed to it in 1894, describing the same in part as bounded by a line "*Beginning at the corner formed by the face of the wall on the south side of the branch and the fence on the Westerly side of the Main Alley in the grounds owned by the Stockyards*" (emphasis supplied), with the course description, "Together with all the rights, privileges, and appurtenances, and rights of way, and easements therein and thereby, secured and conveyed, together with all the rights, privileges, appurtenances, easements, and rights of way to the same belonging or in anywise appertaining and all the improvements, machinery," etc. (J. App. 300)

(d) On the 24th day of May, 1906 (J. App. 294), or about 12 years after the first conveyance to Washington Abattoir Company of West Virginia, Union Stock Yard sold to Keane and Auth a parcel of land, adjoining the southerly portion of the premises conveyed in 1894, in which deed the Stockyards granted the land therein described, describing the eastern line of the property "on the west line of said alley, * * * together with all the rights, privileges and appurtenances, easements and rights of way to the same belonging or in anywise appertaining *but not including the use of any alleys south of the North line of the property hereby conveyed.*" (Emphasis supplied) (J. App. 295).

(e) On January 1, 1910, the Stockyards mortgaged its property (J. App. 308) to the American Security and Trust Company, in which the property mortgaged was described, in part, as follows (J. App. 309):

"To the right of way of the B. & O. Railroad (Alexandria Branch) thence with said right of way * * * to the land of the Washington Abattoir, thence * * * *to the line of an alley or road thence with said alley * * * to the north face of a stone wall.*" (emphasis supplied). (The property encumbered included the property now owned by defendants.) The alley or road again is referred to therein.

(f) On May 22, 1916 (J. App. 314), Loffler and Keane sold to Washington Abattoir Company of the District of Columbia the parcels conveyed in the 1904 and 1906 deeds, describing the same, in part, as "Beginning for the same at a corner formed by the face of the wall on the south side of a Branch and a fence on *the westerly side of the Main Alley* on the grounds formerly owned by" the Stockyard Company, with the description, and, then, "Together with the improvements, rights, privileges, and appurtenances to the same belonging." (J. App. 316)

(g) On June 22, 1928 (J. App. 317), the Stockyards Company sold to A. Loffler Provision Company another

parcel, adjoining and north of the property described in the 1890 lease, conveying the same in fee simple "with the improvements, easements and appurtenances thereunto belonging," describing the property by course and call; "To HAVE AND TO HOLD, the said land and premises, with the improvements, easements, and appurtenances, unto and to the use of the said party of the second part in fee simple."

(h) On July 6, 1928 A. Loffler Provision Company sold to Keane-Loffler, Inc. (J. App. 322).

(i) Later the name of Keane-Loffler, Inc., was changed to "Adolf Gobel, Inc." (J. App. 242), which filed a voluntary petition for reorganization, under Section 128 of Chapter X of the Act of Congress relating to Bankruptcy, in the District Court of the United States for the Southern District of New York on September 29, 1941, (J. App. 273), which petition was duly approved by the United States District Judge, by order entered on the 30th day of September, 1941, (J. App. 273) and there was conveyed to plaintiff the property hereinbefore mentioned (J. App. 275); "And all of the right title and interest in and to the same of said Adolf Gobel, Inc., together with any and all right, title and interest or estate which Adolf Gobel, Inc., Debtor, or Charles Seligson, as Trustee of Adolf Gobel, Inc., Debtor, may have or could claim or assert *in and to any of the land adjoining the above described property on the north, east or south*, free and clear of all liens and encumbrances * * *.

"To HAVE AND TO HOLD said premises with all of the privileges and appurtenances thereto belonging * * *.

3. Chain to Kogod

(a) The mortgage of January 1, 1910, recorded January 4, 1910, (J. App. 308) was an encumbrance against the property now owned by defendants but the lien of the same is now released.

(b) On July 27, 1941, Union Stock Yard Company conveyed to Eastern Development Corporation the balance of the area involved in this litigation (J. Ap. 23). The Eastern Development Corporation is owned by defendants (J. App. 207).

(c) Thereafter on May 14, 1942, Eastern Development Corporation conveyed to defendants in the case at Bar.

The defendants attempted on February 4, 1949 to convert the rights, privileges and easements of the plaintiff and invaded without justification or probable cause, plaintiff's rights, for which this injunction suit was filed to remove the obstruction from the easements.